No. SC94865

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

CHRISTOPHER SANDERS,

Appellant.

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

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. Sanders appeals his conviction of murder in the second degree, § 565.021, RSMo 2000 (L.F. 49). He asserts that the trial court erred in refusing to submit an instruction for the included offense of involuntary manslaughter in the first degree (App.Sub.Br. 17).

* * *

On November 22, 2011, Zonia Brown was "prostituting" at the Capri Motel (Tr. 430). She was knocking on doors, trying to get a "trick" (Tr. 430). She met up with Sherilyn Hill and Mr. Sanders in the motel parking lot (Tr. 430). Another man, "Montay," was with them; Ms. Brown knew Montay to be "a good dealer, a drug dealer" (Tr. 431). She had hung out with him before and bought "dope" from him (Tr. 431). The group invited Ms. Brown to come with them to a room at the nearby Motel Royale (Tr. 431).

Mr. Sanders rented Room 206 (Tr. 270-271, 432). According to hotel records, Mr. Sanders checked in at 11:42 p.m. (Tr. 273-274). The group then went up to the room (Tr. 435). Montay did not stay long (Tr. 435). Mr. Sanders gave Ms. Brown one "hit" of crack, or a "little piece of dope" (Tr. 437). Mr. Sanders was "smoking crack and he was already intoxicated" (Tr. 439). Ms. Hill also wanted some crack, but Mr. Sanders would not give it to her; Mr. Sanders was "being stingy with the crack" (Tr. 439).

At some point, Ms. Hill pulled out a knife, but she "never did come at"

Mr. Sanders (Tr. 440-441). She was holding the knife a couple of feet from Mr. Sanders (Tr. 442). Mr. Sanders did nothing; he did not react to the knife in any way (Tr. 442). Ms. Hill and Mr. Sanders yelled at each other; she said, "You better give me some crack," but Mr. Sanders refused (Tr. 443). Ms. Hill eventually put the knife back in her pocket (Tr. 442-443). Mr. Sanders smoked some more crack (Tr. 443).

Later, Ms. Hill again tried to get Mr. Sanders to give her some crack (Tr. 446). When she was not successful, she pulled out her knife again and said, "You better give me some crack" (Tr. 447). Ms. Hill did not stab Mr. Sanders, and Mr. Sanders told her to put the knife away (Tr. 447). Ms. Hill put the knife away (Tr. 447). Ms. Hill eventually pulled out her knife a third time, but she did not "come at him with the knife" or try to stab him (Tr. 449-450). Mr. Sanders also did not "come at her" or attempt to hit her (Tr. 450). Ms. Hill again put the knife away, leaving it on the sink in the bathroom (Tr. 450, 452). No one had been injured or stabbed or cut or hit (Tr. 451).

At that point, Mr. Sanders looked at Ms. Brown and said, "You ready?" (Tr. 453). Ms. Brown thought Mr. Sanders was finally going to give her some crack, but he turned around and kicked Ms. Hill (Tr. 454). Mr. Sanders kicked her repeatedly: "He just kicked her a thousand times. He kicked her over ten times" (Tr. 454). Mr. Sanders kicked Ms. Hill on the left-hand side, on the head (Tr. 455). Ms. Hill was facing away from him, and she hit the

wall to her right and fell down (Tr. 455-456). Ms. Hill tried to get up, but she could not; Mr. Sanders kicked her again (Tr. 455). He kicked her on the side of the head repeatedly—"so many times [that Ms. Brown] wouldn't keep count" (Tr. 457).

Ms. Brown said, "Don't kick her no more. Don't kick her no more" (Tr. 457). But Mr. Sanders said, "Shut up, I ain't going to hurt you. She shouldn't have pulled that knife on me" (Tr. 457). Ms. Hill kept trying to get up, but Mr. Sanders kept on kicking her (Tr. 457). Eventually, Ms. Hill just lay there, and she took one breath, "like a snorting sound," and "that was her last breath" (Tr. 458). Mr. Sanders then wrapped her head up in a sheet, and Ms. Brown ran out of the room (Tr. 458).

Outside, Ms. Brown encountered some people, and she said that "a girl is in a hotel room hurt bad" (Tr. 460). One of those people was Timothy Murphy (aka "Peanut"), and he recalled Ms. Brown saying that Ms. Hill was "getting f---ed up" (Tr. 398, 404-405). He recalled that she said, "This white boy is kicking her and beating the sh-- out of her. I ran out of there" (Tr. 398, 404-405). But thinking that it was not "something serious," Mr. Murphy did not call the police (Tr. 398; *see* Tr. 461). Ms. Brown was "scared to call the police" because she "had a warrant," and she "didn't know what to do" (Tr. 460). She did not want to go to jail (Tr. 460-461). Ms. Brown knew that Mr. Sanders had "beat her to death" (Tr. 462). She never saw Ms. Hill again until

December 7 (Tr. 462).

On December 7, 2011, Alejandro Jarmillo, a maintenance worker at the Motel Royale went downstairs to do some cleaning (Tr. 259-260). As he cleared away some leaves on the ground, he saw a foot (Tr. 264). He stopped what he was doing, went upstairs, and told the manager to call the police (Tr. 265). When the police arrived, Mr. Jarmillo directed the police to the body (Tr. 265-266).

The victim's body was under the stairway, and there was a "red substance" on some of the steps (Tr. 286, 288-289). The victim's right foot was protruding from under the stairs (Tr. 290). The rest of the body was not visible; it was behind some stacks of mirrored glass along the edge of the stairway railings (Tr. 291). There was a pillow next to the victim's head (Tr. 292). The victim was wearing a blue shirt, and a sheet and towel were wrapped around her neck and the lower part of her face (Tr. 293). The victim was face down (Tr. 294).

The police discovered the victim's identity, and their investigation put them in contact with Ms. Brown and Mr. Murphy (Tr. 310-311; *see* Tr. 484). Mr. Murphy told the police that a white male had attempted to sell him Room 206 at the Motel Royale, and he tentatively identified Mr. Sanders in a photographic line-up (Tr. 313, 315, 394, 396-397; *see* Tr. 387). Mr. Murphy said that he had gone to the room, and that he had seen "what he thought

looked like blood in different areas of the room" (Tr. 313; *see* Tr. 389). Mr. Murphy told the police that he also saw some clothing and a hairpiece that belonged to the victim (whom he knew as "Shay") (Tr. 313-315; *see* Tr. 389-390). Further investigation revealed to the police that Mr. Sanders had rented Room 206 on the night of November 22, 2011 (Tr. 270-271, 273-274).

Inside Room 206, there were red stains on the bathroom walls (Tr. 354, 358-359). There were also red stains on the clothes rod, and the rod was bent (Tr. 360). A crime scene investigator collected the rod and samples of the red stains (Tr. 360, 362).

On December 9, 2011, law enforcement officers went to look for Mr. Sanders at 115 Northwest, Harlem Road, Apartment 274 (Tr. 365). They arrived at 8:45 p.m. (Tr. 366). As they were standing outside the door, Mr. Sanders opened the door (Tr. 367). When he saw the officers, he tried to close the door, but the officers grabbed him and detained him (Tr. 367). They informed Mr. Sanders that he was under arrest for a homicide, and Mr. Sanders said that he "would work with [the police] and he wanted to talk to the detectives and wanted to cooperate" (Tr. 368). The police seized clothing from Mr. Sanders's apartment, including a pair of boots (Tr. 376-377).

Mr. Sanders gave a statement (Tr. 322, 484). Mr. Sanders told the police that he did not have a weapon in Room 206, and that he did not see anyone else with a weapon (Tr. 491). Mr. Sanders denied that there was any

type of altercation in the room (Tr. 493).

An autopsy revealed that the victim's body had started to decompose (Tr. 529). The victim had an abrasion on the left side of her forehead and on the end of her nose (Tr. 529). The upper left aspect of her upper lip was swollen and bruised (Tr. 530). There was also an abrasion next to her left eyebrow (Tr. 531). There was a hematoma or a collection of blood beneath that abrasion (Tr. 531). Immediately below her left eye was a three-quarter-inch laceration caused by "some sort of blunt force" (Tr. 532-533). There was an abrasion in front of her left ear and a scrape or impression along her lower left jaw (Tr. 534-535). An internal examination revealed hemorrhage in multiple different areas of the victim's scalp (Tr. 552). There was also blood in the subdural space and the subarachnoid space inside the skull (Tr. 554). The subarachnoid bleeding was in multiple different areas (Tr. 554).

The bruise on the victim's lip continued on to the inside of her upper lip (Tr. 535-536). A five-eighths-inch laceration was within that bruise (Tr. 536). The frenulum, the tissue that connects the upper lip to the gum, was torn (Tr. 536). The lower lip was also bruised, and there was a one-and-a-half-inch by one-and-a-quarter-inch laceration inside the lower lip (Tr. 537). The lower frenulum was torn (Tr. 537). One of the victim's incisors was loose (Tr. 538).

There was a ligature mark on the victim's neck, where something had been used to strangle her (Tr. 538-539). There were also bruises on the

victim's neck (Tr. 539). The bruises showed that the victim was alive when the ligature was applied (Tr. 540). A bed sheet was still tied around the victim's neck when she was removed from the body bag, and the knot was at the back of her neck (Tr. 545-546). There was also a blood-tinged towel over the lower part of her face and upper part of her neck (Tr. 546). The bed sheet had created the ligature mark (Tr. 546-547). Internally, the victim's thyroid cartilage was fractured, and there was hemorrhage between her esophagus and trachea (Tr. 555). There was also hemorrhage along her left collarbone (Tr. 556).

There was an abrasion on the left thigh that measured seven inches in maximum dimension (Tr. 541). There was also a scratch on her left lower leg, and an abrasion and bruise on the top of her left foot (Tr. 541). There were two abrasions below the right knee, and on the front of the right lower leg there were additional scratches (Tr. 541). There was another abrasion on the inside of her right foot (Tr. 542-543).

There was an abrasion on the left side of the victim's chest (Tr. 542). There were also "four distinct areas of abrasion along the left side of her abdomen [and] . . . left hip" (Tr. 542).

The cause of the victim's death was blunt force trauma of the head and strangulation (Tr. 559). Although cocaine and methamphetamine intoxication contributed to her death, the victim would not have died without the blunt

force trauma and strangulation (Tr. 559-560).

Testing revealed the presence of the victim's blood on the clothes rod from Room 206 (Tr. 586-587). The genetic profile of a minor contributor of DNA found on the rod was consistent with Mr. Sanders, but it was only a partial profile (Tr. 587). The victim's blood was also found on the floor of the bathroom, the west wall of the bathroom, and the east wall of the bathroom (Tr. 588). There was blood on Mr. Sanders's boot, and it was the victim's blood (Tr. 589-590).

The State charged Mr. Sanders with murder in the second degree, § 565.021, RSMo 2000 (L.F. 6).

At trial, Mr. Sanders testified that he met the victim for the first time that night, and that they decided to "go get a room" (Tr. 605). He said he wanted "to have a good time, want[ed] to go fool around" (Tr. 605). He said he knew she was a prostitute (Tr. 606). He said that more than one person went to the room and consumed alcohol and drugs, and that, at some point, the victim waved a knife around in his face and said, "You know, we're almost out over here" (Tr. 613). Mr. Sanders said that he did not fear for his safety at that point, that he continued drinking, and that he "didn't really think much about it really" (Tr. 614).

Mr. Sanders said that the victim pulled out her knife again about ten or fifteen minutes later and stuck it in his face (Tr. 615). He said that she said,

"You're going to buy some more crack" (Tr. 615). Mr. Sanders testified that, at that point, he was "apprehensive" and he said, "Look, I done got the room, like you said" (Tr. 615). He testified that he told the victim that he had already spent fifty dollars on crack (Tr. 615). He said that he started to feel like he was getting "hustled," and that they were not going to have sex, so he told them to leave (Tr. 616).

Mr. Sanders testified that he did not leave because he "wanted to get laid," and he was "still under the presumption that was going to eventually happen" (Tr. 616). He said that the victim then came up behind him with her knife and put it to his throat (Tr. 617). He said that the knife sliced his throat and that he bled all over his jacket (Tr. 617). He said that the victim asked him, "Are you ready?" (Tr. 617). Mr. Sanders testified that he thought it was "time to have sex," but that the victim said, "Pussy, I'll just take your sh--" (Tr. 617). He said that the victim then took his wallet, threw it to Ms. Brown, and said, "Get his money" (Tr. 617).

Mr. Sanders said that he then took the victim's knife hand away from his neck and hit her in the side of her head (Tr. 618). He said that she then "started swinging wild, just crazy, just swinging crazy" (Tr. 618). He said that he thought he was "going to get stabbed" so he "done put [his] hands on her" (Tr. 619). He said that he elbowed her in the side of the head as hard as he could, and that she stumbled back (Tr. 619). He said that she kept "swinging

the knife," and so he kicked her in the chest (Tr. 619). He said that he ran to her and "bust her in the mouth" (Tr. 620). He said that the victim fell backwards and hit her head on the sink (Tr. 620). He said that she dropped the knife, but that she immediately went for the knife again (Tr. 621). He said that he kicked the knife away and that, in trying to kick the knife away, he kicked her in the face (Tr. 621). He said that the victim flipped up and "smack[ed] her head kind of back in [the] corner" (Tr. 621). He said that the victim was "out" (Tr. 621).

Mr. Sanders said that when he turned around, Ms. Brown had a knife in her hand, too (Tr. 622). He said that she threw down his wallet and ran out of the room (Tr. 622). He said that Ms. Brown had stolen his money, and that he decided it was time to go home (Tr. 623-624). He said that he did not wrap the victim in a towel or sheet, and that he did not tie anything around her neck (Tr. 623). He said that he reported the robbery at the motel office, and that he told them, "She's hurt over there" (Tr. 625). He said that "[n]othing [he] did to her . . . was life-threatening" (Tr. 624). He said that when he left, "[s]he looked all right to [him]" (Tr. 624). He said that he did not leave her in the room, and that he carried her down the steps and left her on the landing "right beside the office" (Tr. 625-626). He said that, shortly thereafter, the victim was gone from where he had left her; he said she disappeared while he was in Room 206 making sure he "had everything" (Tr. 630).

Mr. Sanders said that he never took the victim down into the basement (Tr. 636). He said that when he went back to the room later, he noticed that the sheets were missing from the bed (Tr. 637). He said that Mr. Murphy was in the room, and that Mr. Murphy would not let him inside (Tr. 637).

Mr. Sanders said that, when he went to talk to the police, he did not tell the police what had happened because he "wanted to know what they knew" (Tr. 639). He said he did not "play their game," and that he did not tell them about soliciting a prostitute, smoking crack, or getting robbed by "a couple of girls with knives" (Tr. 639, 645). When asked why he did not mention that he had been robbed, he said, "A girl took my money. I don't know. Ego. I don't know what it was" (Tr. 645). He also said he was not proud of "the fact that [he] had to put [his] hands on a girl" (Tr. 646).

Mr. Sanders admitted that he hit and kicked the victim, but when asked if he had strangled her, he said, "Hell no" (Tr. 646). He said that he did not put her in the basement, and that he never intended to hurt or kill her (Tr. 646). When asked if he intended to cause some injury, he said, "No. No. I tried to take the knife away from her, disarm her, and sit her down if I had to. And that's just the way it worked out, that I had to knock her ass out before she stopped" (Tr. 647).

At the instructions conference, defense counsel argued that the court should submit an instruction on the lesser included offense of involuntary

manslaughter (Tr. 701). The defense argued that, in light of the decisions in *State v. Beeler*, 12 S.W.3d 294 (Mo. 2000), and *State v. Frost*, 49 S.W.3d 212 (Mo.App. W.D. 2001), it was reversible error to refuse to submit involuntary manslaughter (Tr. 701-702). The prosecutor argued that there was no evidence to support a charge of involuntary manslaughter (Tr. 702). The prosecutor pointed out that "the only evidence with respect to the method of strangulation that occurred in this case . . . was the use of a sheet from which significant force was applied for some significant period of time resulting in an internal fracture in the neck, meaning that it could not have occurred without a person acting in an intentional manner to cause the death" (Tr. 702). The prosecutor argued that there was no evidence that Mr. Sanders "committed that act in a manner that could give rise to a reckless conduct" (Tr. 702). The trial court refused Mr. Sanders's proffered instruction for the included offense of involuntary manslaughter (Tr. 703).

The trial court instructed the jury on murder in the second degree and the included offense of voluntary manslaughter (L.F. 18, 20). The trial court also instructed the jury on self-defense (L.F. 22-23).

The jury found Mr. Sanders guilty of murder in the second degree (L.F. 32; Tr. 752). The jury recommended that Mr. Sanders be sentenced to life imprisonment (Tr. 781). On May 10, 2013, the trial court sentenced Mr. Sanders to life imprisonment (Tr. 808).

ARGUMENT

I.

The trial court did not commit reversible error in refusing to submit Mr. Sanders's proffered instruction on the included offense of involuntary manslaughter in the first degree; and even if the trial court erred, Mr. Sanders was not prejudiced.

Mr. Sanders asserts that the trial court erred in refusing to submit his proffered instruction on the included offense of involuntary manslaughter in the first degree (App.Sub.Br. 19). He argues that the instruction should have been submitted because "the jury could have found either that [he] recklessly caused the death of [the Victim] or that [he] 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" (App.Sub.Br. 19).

A. The standard of review

"This Court reviews *de novo* a trial court's decision whether to give a requested jury instruction under section 556.046, RSMo . . .,[ ] and, if the statutory requirements for giving such an instruction are met, a failure to give a requested instruction is reversible error." *State v. Jackson*, 433 S.W.3d 390, 395 (Mo. 2014) (footnote omitted).

As a general matter, "[a]n appellate court will not remand for a new trial on the basis of an error that did not violate a defendant's constitutional

rights unless 'there is a reasonable probability that the trial court's error affected the outcome of the trial.' " *See id.* at 395 n. 4. Thus, for instance, the Court has held that "[t]he failure to give a different lesser-included offense instruction 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." *State v. Johnson*, 284 S.W.3d 561, 575 (Mo. 2009). However, in resolving claims of trial-court error in refusing to instruct down, the Court has also held that "prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence." *See Jackson*, 433 S.W.3d at 395 n. 4 (citing *State v. Redmond*, 937 S.W.2d 205, 210 (Mo. 1996)).

B. The trial court did not commit reversible error in refusing Mr. Sanders's proffered instruction for the included offense of involuntary manslaughter in the first degree

"A defendant may be convicted of an offense included in an offense charged in the indictment or information[.]" § 556.046.1, RSMo Cum. Supp. 2013. One circumstance in which an offense is an included offense is when "[i]t is specifically denominated by statute as a lesser degree of the offense charged." *Id.*

Here, Mr. Sanders was charged with murder in the second degree (L.F. 6). By statute, the offense of involuntary manslaughter in the first degree is a

lesser degree offense of murder in the second degree. *See* § 565.025.2(2)(b), RSMo 2000. Thus, the question is whether the trial court was obligated to instruct the jury on the requested included offense.

Generally, a trial court is obligated to give an instruction on a lesser offense when three conditions are met: "[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 for which the instruction is requested." *State v. Jackson*, 433 S.W.3d at 396.

Here, Mr. Sanders made a timely request (Tr. 701). Additionally, there was a basis to acquit Mr. Sanders of the immediately higher included offense. *See* § 565.046.3, RSMo Cum. Supp. 2013 ("The court shall be obligated to instruct the jury with respect to a particular included offense only if there is a basis in the evidence for acquitting the defendant of the immediately higher included offense and there is a basis in the evidence for convicting the defendant of that particular included offense.").

The State charged Mr. Sanders with murder in the second degree, and the verdict director for that offense instructed the jury to determine whether Mr. Sanders knowingly "caused the death of [the victim] by kicking her and strangling her"—but *not* under the influence of "sudden passion," and *not* in lawful self-defense (*see* L.F. 18). The trial court also submitted an instruction

for the lesser included offense of voluntary manslaughter, and the jury was instructed to determine whether Mr. Sanders knowingly "caused the death of [the victim] by kicking her and strangling her" (under the influence of sudden passion and not in lawful self-defense) (L.F. 20).

The jury, of course, did not have to believe that Mr. Sanders acted under the influence of "sudden passion," or that he "knowingly" caused the victim's death. The jury also did not have to believe, for instance, that Mr. Sanders strangled the victim. Thus, there was a basis to acquit Mr. Sanders of the immediately higher offense of voluntary manslaughter.

As the Court stated in *Jackson*, "the jury's right to disbelieve all or any part of the evidence and its right to refuse to draw needed inferences is a sufficient basis in the evidence—by itself—for a jury to conclude that the state has failed to prove the differential element" of the greater offense. *State v. Jackson*, 433 S.W.3d at 399. As such, there was a basis in this case to acquit Mr. Sanders of voluntary manslaughter.

The next question is whether there was a basis to convict Mr. Sanders of recklessly causing the victim's death as posited in the proffered instruction for involuntary manslaughter in the first degree. Mr. Sander's instruction would have required the jury to determine whether "defendant [recklessly] caused the death of [Victim] by kicking her" (Supp.L.F. 1). This instruction differed from the immediately higher offense in important respects. First, it

did not contain the "sudden passion" element, and it reduced the mental state from "knowingly" to "recklessly." In addition, as drafted, it submitted a smaller subset of the charged conduct—*i.e.*, instead of including both "kicking" and "strangling" the victim for causation, Mr. Sander's proffered instruction predicated criminal liability solely on his "kicking" the victim and thereby causing her death.

The question, then, is whether there was evidence to support a finding of guilt on this submission. Citing *State v. Randle*, 465 S.W.3d 477, 480 (Mo. 2015); and *State v. Roberts*, 465 S.W.3d 899, 902-903 (Mo. 2015), Mr. Sanders asserts that "[s]ince the only difference between murder in the second degree, voluntary manslaughter, and involuntary manslaughter is the mental element (knowing, sudden passion, and reckless)," the trial court was obligated to submit the "nested" included offense of involuntary manslaughter (App.Sub.Br. 23). While respondent generally agrees that the offense of involuntary manslaughter is "nested" within the greater offenses of murder in the second degree and voluntary manslaughter,[1] the difference in the submissions here was not limited to the culpable mental state.

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[1] Respondent does not agree with Mr. Sanders's assertion that voluntary manslaughter is "nested" within murder in the second degree (App.Sub.Br. 23). *See State v. Payne*, 488 S.W.3d 161, 163-164 (Mo.App. E.D. 2016).

In *Randle* and *Roberts*, the Court held that where the sole difference between two offenses is that one has a lesser culpable mental state, the lesser offense is a "nested" lesser included offense. As the Court stated in *Roberts*, "Section 562.021.4 provides that '[w]hen recklessness suffices to establish a culpable mental state, it is also established if a person acts purposefully or knowingly.' " *Id*. at 902.

The principle applied in *Randle* and *Roberts*, however, is not directly applicable here because the conduct attached to the culpable mental state differed significantly between the greater and lesser offenses. As outlined above, Mr. Sanders's proffered instruction posited that he recklessly caused the victim's death by "kicking" her (Supp.L.F. 1). This was a substantial difference because it altered the *causation* and not merely the culpable mental state. Accordingly, the question that must be resolved is whether there was a basis in the evidence to find that Mr. Sanders recklessly caused the victim's death by *kicking* her.

Mr. Sanders argues that the jury could have found that he was reckless in three ways. First, he asserts that the jury could have believed that he "defended himself [from the victim] but recklessly used an amount of force that was a gross deviation from what a reasonable person would use under the circumstances" (App.Sub.Br. 26). Second, he asserts that, even if the jury did not believe he acted in self-defense, the jury could have believed that

"kicking [the victim] in the head constituted a substantial and unjustifiable risk to [the victim], and that it was a gross deviation from the standard of care that reasonable person would use, but that Mr. Sanders did not intentionally cause [the victim's] death" (App.Sub.Br. 26-27). Third, he asserts that "the jury could have found that [he] recklessly caused [the victim's] death by injuring her, then leaving her, without any help, in a vulnerable position that ultimately led to her death" (App.Sub.Br. 27).

But there are problems with these arguments. The final alternative Mr. Sanders proposes—that he left the victim helpless and her death was apparently caused by someone else—is not an included offense of the offense that was charged in this case, namely, that Mr. Sanders caused Victim's death by kicking and strangling her. *See State v. Collins*, 154 S.W.3d 486 (Mo.App. W.D. 2005) (an included offense must be based on the criminal conduct charged in the indictment or information). Put simply, if someone else strangled the victim or otherwise caused her death, Mr. Sanders was not guilty of the included offense of involuntary manslaughter in the first degree; rather, he was merely guilty of an assault before a later homicide that was committed by some other person.

The problem with Mr. Sanders's other arguments is that there was virtually no evidence to support the finding that he caused the victim's death solely by kicking her. At trial, the expert who conducted the autopsy testified

that the victim had some blunt-force injuries to her head (Tr. 529-535, 552-554). The evidence also showed that the victim had a ligature mark on her neck, where something had been used to strangle her (Tr. 538-539). There were bruises on the victim's neck, and the bruises showed that she was alive when the ligature was applied (Tr. 529-540). A sheet had been tied around her neck, and the knot was at the back of her neck (Tr. 545-546). The sheet had created the ligature mark (Tr. 546-547). The victim's thyroid cartilage was fractured, and there was bleeding between her esophagus and trachea (Tr. 555). There was also hemorrhage along her left collarbone (Tr. 556).

With regard to the cause of death, the expert testified that the cause of death was blunt force trauma of the head and strangulation (Tr. 559, 564). Although cocaine and methamphetamine intoxication contributed to her death, the expert opined that she would not have died without the blunt force trauma and strangulation (Tr. 559-560). There was no testimony stating that the blunt-force injuries *alone* would have caused death (*see* Tr. 559-565).

Accordingly, as a threshold matter, it is arguable whether the trial court was obligated to instruct on the offense of involuntary manslaughter in the first degree as proffered in Instruction A. On the other hand, respondent acknowledges that the jury was free to disregard all or part of the expert's testimony, and the evidence otherwise showed that Mr. Sanders brutally and repeatedly kicked the victim. Thus, as a theoretical matter, it may have been

possible for the jury to infer—even if it was not reasonably probable—that Mr. Sanders caused the victim's death by kicking her. However, even if the trial court erred in refusing the instruction, Mr. Sanders was not prejudiced.

C. The Court should not presume prejudice

Citing *Jackson*, Mr. Sanders asserts that the trial court's error requires a new trial because "prejudice is presumed" (App.Sub.Br. 29). But while the Court has stated in some cases that the trial court's incorrectly refusing to give an included offense instruction is "reversible error," or that prejudice is "presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence," *see Jackson*, 433 S.W.3d at 395 & 395 n. 4, the Court has also recognized that a trial court's failing to give an included offense instruction that was supported by the evidence is not *always* prejudicial, reversible error. *See State v. Johnson*, 284 S.W.3d at 575.

Thus, rather than presuming prejudice when analyzing a trial court's failing to give a non-mandatory lesser included instruction, the Court should look to Rule 28.02, which provides that "[t]he giving or failing to give an instruction . . . in violation of this Rule 28.02 . . . shall constitute error, *the error's prejudicial effect to be judicially determined*[.]" Rule 28.02(f) (emphasis added). This Court recently observed in *State v. Blurton*, 484 S.W.3d 758, 768 n. 7 (Mo. 2016), that "[a] non-mandatory lesser included instruction is governed by Rule 28.02(b)[.]" Accordingly, under the terms of Rule 28.02(f),

prejudice should be "judicially determined"—and not presumed—when a trial court errs in failing to give a requested, included offense instruction.

Generally, "[w]hen reviewing claims of instructional error, this Court will reverse the circuit court's decision only if the instructional error misled the jury and, thereby, prejudiced the defendant." *State v. Zetina-Torres*, 482 S.W.3d 801, 810 (Mo. 2016). " '[R]eversal is only warranted when the instructional error is so prejudicial that it deprived the defendant of a fair trial.' " *Id.* "Prejudice occurs when an erroneous instruction may have influenced the jury adversely." *Id.* In other words, the Court should "not remand for a new trial on the basis of an error that did not violate a defendant's constitutional rights unless 'there is a reasonable probability that the trial court's error affected the outcome of the trial.' " *Jackson*, 433 S.W.3d 395, n. 4 (quoting *State v. Forrest*, 183 S.W.3d 218, 224 (Mo. 2006)).

D. Mr. Sanders was not prejudiced

Here, a review of the record reveals several circumstances that dispel any reasonable probability that the trial court's error affected the fairness of Mr. Sanders's trial.[2]

[2] Alternatively, if the Court concludes that the trial court's error gave rise to a presumption of prejudice, respondent submits that the facts of this case rebut that presumption.

a. The general rule. First, a longstanding rule in Missouri has been that "[t]he failure to give a different lesser-included offense instruction 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." *State v. Johnson*, 284 S.W.3d at 575 (citing *State v. Glass*, 136 S.W.3d 496, 515 (Mo. 2004); *State v. Johnston*, 957 S.W.2d 734, 751-752 (Mo. 1997)); *see State v. Jones*, 979 S.W.2d 171, 185 (Mo. 1998); *State v. Six*, 805 S.W.2d 159, 164 (Mo. 1991); *Fisher v. State*, 359 S.W.3d 113, 122 (Mo. App. W.D. 2011); *State v. Ryan*, 229 S.W.3d 281, 289 (Mo. App. S.D. 2007).

Accordingly, here, inasmuch as Mr. Sanders was found guilty of murder in the second degree, and inasmuch as the trial court submitted an instruction for the included offense of voluntary manslaughter (*i.e.*, the jury had a lesser option if it was not convinced beyond a reasonable doubt of Mr. Sanders's guilt), it cannot be said that Mr. Sanders was prejudiced by the absence of yet another lesser included offense instruction.

Mr. Sanders relies on *State v. Frost*, 49 S.W.3d 212, 221 (Mo.App. W.D. 2001) (App.Sub.Br. 23-25)—a case in which the Court of Appeals declined to apply the general rule stated above. Respondent submits, however, that the analysis in cases like *Frost* should be reexamined; and, in any event, that cases like *Frost* are distinguishable from Mr. Sanders's case in important

respects.

In *Frost*, the Court of Appeals pointed out that the only difference between the offenses submitted to the jury, namely, murder in the second degree and voluntary manslaughter, was the element of "sudden passion." *Id.* at 219, 221. In other words, the greater offense and lesser offense submitted to the jury had the same mental state of "knowingly," and the jury's verdict merely revealed that the jury did not believe that the murder was committed under the influence of "sudden passion." *Id.*

The Court of Appeals then pointed out that the lesser offense that was *not* submitted to the jury (involuntary manslaughter) was also "consistent with a purposeful homicide" in light of the defendant's claim that he had acted in imperfect self-defense. 49 S.W.3d at 220 (citing *State v. Beeler*, 12 S.W.3d 294, 298 (Mo. 2000)). In other words, in a case involving imperfect self-defense, a potential guilty verdict on involuntary manslaughter was "not foreclosed" because "[t]he conduct of [the defendant] could still have been consistent with a purposeful homicide[.]" *Id.*

In short, because the evidence of guilt was consistent with a conviction of the greater offense or the refused lesser offense, and because the firmness of the jury's guilty verdict on the greater offense could have been further tested by an involuntary manslaughter instruction, the Court of Appeals concluded that it could not "say that the jury was adequately tested on the

elements of second-degree murder to the extent that submission of involuntary manslaughter would have made no difference." *Id*.

Respondent submits, however, that the testing of the jury's verdict in *Frost* was more rigorous than the Court of Appeals acknowledged. First, while murder in the second degree and voluntary manslaughter both carry the culpable mental state of "knowingly," the culpable mental state for voluntary manslaughter is a *mitigated* culpable mental state, in that it is under the influence of "sudden passion" arising from adequate case. In other words, a voluntary manslaughter instruction does test the firmness of the jury's belief that a defendant acted with a non-mitigated (or more culpable) culpable mental state of "knowingly."

Accordingly, the question of whether Mr. Sanders was prejudiced should not turn on whether the jury had the opportunity to consider specifically whether Mr. Sanders acted "recklessly" in causing the victim's death. Rather, the question should turn on whether the jury was firm in its belief (*i.e.*, convinced beyond a reasonable doubt) that Mr. Sanders "knowingly" caused the victim's death (and not under the influence of sudden passion or in lawful self-defense). That finding certainly could have been tested *further* by a verdict director that posited a reckless mental state, but the testing provided by the voluntary manslaughter instruction was sufficient to confirm that the jury was convinced beyond a reasonable doubt that Mr.

Sanders knowingly caused the victim's death.

In addition, as a general proposition, a prejudice analysis should not focus on whether every element of the greater offense was individually "tested" by an included offense instruction that specifically omitted each differential element of the greater offense. Rather, the Court should recognize that when a lesser included offense is submitted to the jury, and when the jury finds the defendant guilty of the greater offense, the presence of that lesser included offense (along with the option to acquit) necessarily—and adequately—tests the reliability of the jury's verdict, so as to remove any reasonable probability of a different result.

Indeed, the ordinary presumption is that the jury will conscientiously follow the law in rendering its verdict, *i.e.*, that it will not find the defendant guilty unless it is convinced beyond a reasonable doubt that each and every element of the offense has been proved. If the jury is not convinced beyond a reasonable doubt, it can always acquit the defendant. In other words, the option to acquit the defendant generally tests each and every element of the offense, and if the jury has a doubt about any element, the jury can acquit. It is not necessary, therefore, for a lesser included offense instruction to provide "individualized testing" for each element of the greater offense.

Of course, courts have recognized that, practically speaking, juries do not always adhere to theory. In other words, as a practical matter, the

potential for an unreliable verdict can arise when the jury might be unconvinced of the defendant's guilt of the charged offense but is unwilling to acquit because the defendant is plainly guilty of something. *See Beck v. Alabama*, 447 U.S. 625, 634 (1980). In such cases, if there is no lesser included offense for the jury to consider—*i.e.*, no "third option"—the concern is that the jury will simply convict the defendant of the charged offense to avoid the perceived injustice of an outright acquittal. *Id.*

But where the jury is given a "third option" of a lesser included offense, and where the jury then finds the defendant guilty of the greater offense, there is no reason to doubt the reliability of the verdict. To doubt the firmness of the verdict here, for instance, leads to the conclusion that the jury—unconvinced that Mr. Sanders was guilty of murder in the second degree or voluntary manslaughter (but unwilling to acquit him completely because he was plainly guilty of something)—chose the more serious offense of second-degree murder rather than voluntary manslaughter as a means of punishing his less culpable criminal conduct. This makes no sense from a practical standpoint, and if the possibility of nullification is going to be indulged, it should at least be presumed that the jury is not irrational. *See generally Schad v. Arizona*, 501 U.S. 624, 648 (1991) ("Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.").

Finally, the general rule—that there is no prejudice when one lesser included offense is submitted and the jury finds the defendant guilty of the greater offense—also recognizes that the manner in which lesser included offenses are submitted to the jury precludes a finding of prejudice. Lesser included offenses are submitted in descending order, and each included-offense instruction begins with the instruction, "If you do not find the defendant guilty of [the preceding, greater offense], you must consider whether he is guilty of [the included offense]." *See State v. McCullum*, 63 S.W.3d 242, 252 (Mo.App. S.D. 2001). Consequently, when the jury finds the defendant guilty of the greater offense and does not "take the first step in reducing the offense," any error in failing to submit another lesser included offense is not prejudicial. *Id.* at 252-253 (" 'The jury, by finding [Defendant] guilty of first degree assault, did not take the first step in reducing the offense to second degree assault. Under these circumstances, the jury could not have considered a third degree assault instruction, even if it had been given.' ") (quoting *State v. Householder*, 637 S.W.2d 324 (Mo.App. S.D. 1982)).

In sum, because the trial court submitted a lesser included offense to the jury and the jury nevertheless found Mr. Sanders guilty of the greater offense of murder in the second degree, there is no reasonable probability that submitting an additional lesser included offense would have resulted in a different verdict. The Court should reaffirm the general rule and hold that

the submission of any lesser included offense, along with the option to acquit, is sufficient to test the firmness of a jury's finding of guilt on the greater offense.

b. Cases like *Frost* are distinguishable. Even if the Court does not re-affirm the general rule and re-examine the analysis in *Frost*, the Court should nevertheless find that Mr. Sanders was not prejudiced under the facts of his case. In *Frost*, the critical fact that gave rise to a finding of prejudice was the fact that the defendant claimed to have been acting purposely in self-defense (albeit imperfectly) when she engaged in the charged conduct of stabbing the victim. 49 S.W.3d at 220. Under the circumstances, because the evidence of the defendant's culpable mental state for the greater offense was also consistent with the defendant's claimed defense of imperfect self-defense, there was arguably a reasonable probability that the jury would not have found the defendant guilty of murder in the second degree and would have found her guilty of involuntary manslaughter (based on the theory of imperfect self-defense). *See id.*

Here, while Mr. Sanders also claimed that he acted in self-defense, he denied that he engaged in part of the charged conduct—*i.e.*, he denied that he strangled the victim, and his proffered instruction omitted "strangling" from the causation paragraph. Accordingly, Mr. Sanders's claim that he acted in imperfect self-defense in kicking the victim was not "consistent" with the

jury's finding that he knowingly caused the victim's death by kicking *and strangling* her. Thus, unlike in *Frost*, there was no reasonable probability that the evidence that Mr. Sanders knowingly caused the victim's death by kicking and strangling her could have led the jury to conclude that Mr. Sanders recklessly caused the victim's death solely by kicking her.

To the contrary, the evidence that supported the jury's guilty verdict for murder in the second degree showed that Mr. Sanders repeatedly kicked the victim, and that he kicked her on the left side of her head (Tr. 454-456). The evidence showed that the victim tried to get up, but that she could not; and that Mr. Sanders kicked her again (Tr. 455). The evidence showed that he kicked her on the side of the head repeatedly—"so many times [that Ms. Brown] wouldn't keep count" (Tr. 457). The evidence showed that the victim kept trying to get up, but that Mr. Sanders kept on kicking her (Tr. 457). The evidence showed that, after the victim stopped trying to get up, Mr. Sanders wrapped her head up in a sheet (Tr. 458).

In addition, as outlined above, the expert who conducted the autopsy testified that Victim had some blunt-force injuries to her head (Tr. 529-535, 552-554). The evidence also showed that Victim had a ligature mark on her neck, where something had been used to strangle her (Tr. 538-539). There were bruises on the victim's neck, and the bruises showed that she was alive when the ligature was applied (Tr. 529-540). A sheet had been tied around

her neck, and the knot was at the back of her neck (Tr. 545-546). The sheet had created the ligature mark (Tr. 546-547). Victim's thyroid cartilage was fractured, and there was hemorrhage between her esophagus and trachea (Tr. 555). In short, the evidence showed that the victim was strangled.

There is no reasonable probability that the jury—which apparently credited the evidence showing that Mr. Sanders kicked and strangled the victim—would have found that Mr. Sanders recklessly causing the victim's death by kicking alone. There was strong evidence of strangulation, and the jury's verdict shows that the jury was convinced beyond a reasonable doubt that Mr. Sanders strangled the victim.

Missouri courts have long recognized that some acts of violence, when viewed in relation to the charged result, transcend recklessness and do not give rise to a reasonable inference of recklessness. *See*, *e.g.*, *State v. Lowe*, 318 S.W.3d 812 (Mo.App. W.D. 2010) ("Because a person is presumed to have intended for death to follow from acts that are likely to produce that result, a defendant's intentional use of a deadly weapon on a vital part of a victim's body to inflict a fatal injury transcends recklessness so that no rational fact finder could conclude that he did not act knowingly."); *State v. Stidman*, 259 S.W.3d 96, 104 (Mo.App. S.D. 2008) (shooting the victim seven times in the head transcended recklessness); *State v. Newberry*, 157 S.W.3d 387, 391-392, 397 (Mo.App. S.D. 2005) (striking the victim in the head with the claw end of

a hammer with sufficient force to break the skull and penetrate two inches into the brain transcended recklessness).

Although these sorts of "transcend recklessness" cases cannot be relied on after *Jackson* to justify a trial court's refusing to submit a lesser included offense (*i.e.*, they cannot be cited to suggest that there was no error), the logic of the cases still has force in analyzing the probability of a different verdict in a given case. In short, where the evidence supporting the verdict overwhelmingly shows that a homicide was not reckless, it is permissible for a reviewing court to consider the strength of the evidence in making the judicial determination of whether the trial court's error was prejudicial and deprived the defendant of a fair trial.

In sum, the jury's verdict shows that the jury credited the evidence showing that Mr. Sanders knowingly caused the victim's death by kicking her and strangling her. There is no reasonable probability that the jury, if given the option, would have found instead that Mr. Sanders recklessly caused the victim's death solely by kicking her. This point should be denied.

CONCLUSION

The Court should affirm Mr. Sanders's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the attached brief complies with Rule 84.06(b) and contains 8,436 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 3rd day of October, 2016, to:

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