IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC95280
	)	
NATHAN JENSEN,	)	
	)	
Appellant.	)	

APPEAL TO THE
MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF PULASKI COUNTY, MISSOURI
25TH JUDICIAL CIRCUIT
THE HONORABLE D. GREGORY WARREN, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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STATEMENT OF FACTS

Nathan relies on the Statement of Facts from his opening brief. Further, Nathan disagrees with footnote two of Respondent's brief, and he stands by the facts as written on Page 17 of his opening brief. Law enforcement did agree that it was not possible for Nathan to be with Jorgensen killing Stout on the afternoon of December 14th, and that Jorgensen was "off on the time," because Nathan was at the Watson residence on the afternoon of December 14th (TR 772). That was not based solely on the fact that Nathan said that he was at the Watson's residence on the afternoon of December 14th; rather, law enforcement had talked to Cheryl Calhoun (now Watson), who confirmed that Nathan arrived at their residence around noon on December 14th (TR 771), and James Watson also talked to law enforcement and testified at trial that Nathan arrived at their residence around noon on December 14th and stayed until the evening (TR 506-508). This is the context for Sheriff Degase's testimony that Jorgensen was "off on the time," because law enforcement knew from the Watsons that Nathan was at their residence when Jorgensen claimed they were killing Stout (TR 772).

There is also an error in Respondent's statement of facts: Respondent states that the wallet found in Austin Lake belonged to Victim (Resp. Br. 20). However, the wallet found in Austin Lake belonged to Nathan; the record shows that after Jorgensen tried to kill Nathan, Jorgensen and Watson threw Nathan's wallet and laptop into Austin Lake (TR 423, 426). It later was recovered by a passer-by who saw it floating near the edge (TR 645; Ex. 19). Jorgensen also took Nathan's cell phone apart and threw it over a bridge near the river (TR 425).

ARGUMENTS[1]

I.

The trial court erred in refusing to instruct the jury on involuntary manslaughter, a nested lesser included offense of first and second degree murder, because the failure to so instruct violated Nathan's rights to due process of law and to present a defense as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offenses and a conviction only on the lesser, since recklessness is automatically established through knowing conduct under Section 562.021, and the jury could have found that Nathan acted recklessly rather than knowingly, especially when the issue of duress may be considered by the jury under the manslaughter, but not the murder, instructions. Further, Nathan was prejudiced because his jury went down to second degree murder, but the voluntary manslaughter instruction did not fully test the mental element of that crime as it involved the additional element of sudden passion.

Respondent's Concessions

Respondent concedes error in the trial court's failure to submit Nathan's involuntary manslaughter instruction to the jury (Resp. Br. 23-26). Respondent agrees that: 1) the involuntary manslaughter instruction should have been given because it is a

[1] Nathan responds to Respondent's first argument and relies on his opening brief as to the remaining arguments.

nested lesser-included offense of first degree murder; 2) there was a basis for acquitting Nathan of voluntary manslaughter and; and 3) there was a basis for convicting him of involuntary manslaughter, as the evidence supported that crime (Resp. Br. 23-26) (citing *State v. Roberts*, 465 SW.3d 899, 902 (Mo. banc 2015) and *State v. Randle*, 465 S.W.3d 477, 480 (Mo. banc 2015)). Respondent further concedes that voluntary manslaughter is not a "nested" lesser offense of murder in the second degree, as it requires proof of additional facts not required for murder in the second degree (Resp. Br. 29-30).

Prejudice should be presumed from this instructional error

Respondent's sole contention is that Nathan suffered no prejudice from the trial court's instructional error (Resp. Br. 26-40). Respondent acknowledges, as it must, that this Court has very recently 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 State v. Jackson*, 433 S.W.3d 390, 395, n.4 (Mo. banc 2014) (citing *State v. Redmond*, 937 S.W.2d 205, 210 (Mo. 1996)). However, Respondent seeks to avoid such presumption by asserting that the voluntary manslaughter instruction acted as an intervening offense, for purposes of invoking pre-*Jackson* case law, which holds that "when instructions for the greater offense and one lesser offense are given and the defendant is found guilty of the greater," no error or prejudice results. *See State v. Johnson*, 284 S.W.3d 561, 575 (Mo. banc 2009).

Respondent acknowledges that other cases, such as *State v. Frost*, 49 S.W.3d 212, 221 (Mo. App. W.D. 2001), and *State v. Nutt*, 432 S.W.3d 221 (Mo. App. W.D. 2014), hold that the voluntary manslaughter instruction is not a "nested" lesser instruction of

first or second degree murder because it requires additional evaluations regarding the alleged provocation by the victim, whether such provocation amounted to "adequate cause," and whether sudden passion arose from such adequate cause. And that "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," it cannot be said that prejudice did not result from the failure to give a lesser instruction that actually did test the same element. *See Frost*, 49 S.W.3d at 219–20; *Nutt*, 432 S.W.3d at 224–225.

To try and persuade this Court that a non-nested, voluntary manslaughter instruction actually "tests" the differential element – i.e., Nathan's mental state – Respondent asserts that the voluntary manslaughter instruction provided "a lesser option if it was not convinced beyond a reasonable doubt of [Nathan's] guilt." (Resp. Br. 29). Respondent quixotically suggests that, even though both conventional second degree murder and voluntary manslaughter both carry the culpable mental state of "knowingly," that somehow the identical mental state in both instructions "tests" the jury's resolve on the differential element of Nathan's mental state.[2]

[2] It is important for the Court to remember that Nathan's jury was instructed on first degree murder, but rejected that charge, finding him guilty under the second degree murder instruction instead. Therefore, under a proper analysis, the differential element in need of testing – under these facts – was the jury's resolve on the mental state of "knowingly" in the second degree murder instruction.

In order to make such an argument, Respondent asserts that the mental state of "knowingly" contained in the voluntary manslaughter instruction is actually a "*mitigated* culpable mental state, in that it is under the influence of "sudden passion" arising from adequate case [sic]" (Resp. Br. 32 (emphasis in original)). Therefore, according to Respondent, the 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." (Resp. Br. at 32). Respondent assertion is legally incorrect and the Court should not accept such strained logic.

First, Respondent does not and cannot point to any case which holds that the "knowingly" element of voluntary manslaughter is somehow a different or *mitigated* mental state than the "knowingly" element found in the conventional second degree murder statute. On the contrary, this Court has long held that the mental states are the same, but in the situation of voluntary manslaughter, it is an "unexpected force, motivated by another's provocation, that subdues the prior mental state momentarily in causing a responsive act." *State v. Fears*, 803 S.W.2d 605, 609 (Mo. 1991). Second, the voluntary manslaughter statute itself explicitly shows that its elements, including the mental state, are identical to conventional second degree murder, with another element added:

> 1. A person commits the crime of voluntary manslaughter if he:
>
> (1) Causes the death of another person **under circumstances that would constitute murder in the second degree under subdivision (1) of subsection 1**

of section 565.021, except that he caused the death under the influence of sudden passion arising from adequate cause;

Section 565.023.

The only thing this Court should glean from the jury's rejection of voluntary manslaughter is that the jury did not find the additional element – that the Victim provided adequate cause to provoke sudden passion in Nathan. This, however, does not answer the question of what mental State Nathan acted under in causing the death; the jury's resolve remained untested on this differential element. Indeed, nothing in the non-nested voluntary manslaughter instruction tested the differential element of Nathan's mental state and whether he acted "knowingly" in causing the death. Only the involuntary manslaughter instruction could do that.

Respondent asks this Court to impose the following test: "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." (Resp. 36). But this cannot be the test because it fails to acknowledge that it is the jury alone who is the final arbiter of what the evidence does and does not prove. *State v. Pierce*, 433 S.W.3d 424, 433 (Mo. banc 2014).[3] If the evidence supports the giving of a nested lesser-included instruction, but the

[3] Respondent's test is also inconsistent with this Court's admonition that "[e]ach instruction should be evaluated separately and should be given if supported by the evidence, without regard to whether the other instruction is also being given." *Redmond*, 937 S.W.2d at 210.

jury does not receive any instruction that tests its resolve on the differential element at issue in its verdict, then this Court cannot be convinced that the defendant was not prejudiced.

To both effectuate and reconcile the long history of this Court's case law concerning the giving of lesser-included instructions and the prejudice resulting therefrom, this Court should adopt the following test:

> **Prejudice is presumed from the failure to submit a requested nested lesser-included instruction where the remaining instructions fail to test the differential element found in the jury's verdict.**

The adoption of this test would not require this Court to overturn or even modify its previous cases. For instance, in *State v. Johnson*, 284 S.W.3d at 575, the defendant was convicted of first degree murder, but the jury was also instructed on conventional second degree murder. On appeal, the defendant asserted error in the failure to instruct the jury on voluntary manslaughter and second degree murder without sudden passion. *Id*. This Court found no prejudice from the failure to so instruct because a conventional second degree murder instruction was given. *Id.* Thus, under the test Nathan urges here, the result in *Johnson* would not change because the second degree murder instruction adequately tested the jury's resolve on its verdict of first degree murder.

Similarly, in *State v. McLaughlin*, 265 S.W.3d 257, 279-271 (Mo. banc 2008), the defendant was convicted of first degree murder, but the jury was also instructed on conventional second degree murder. On appeal, the defendant raised error in the failure to give a felony murder instruction. *Id.* This Court held that no prejudice resulted from

refusing to submit a felony murder instruction because the conventional second degree murder instruction sufficiently tested the evidence of deliberation by giving the jury the option of convicting the defendant of a lesser offense. *Id.* (*citing State v. Kinder*, 942 S.W.2d 313, 330 (Mo. banc 1996). Again, the question would have been different had the juries in *McLaughlin* or *Kinder* found the defendant guilty of conventional *second* degree murder rather than first degree murder. In that situation, because both conventional and felony murder invoke a "knowing" mental state, the submission of conventional second degree murder alone would not be enough to test the differential element of the defendant's mental state. However, those were not the facts in either *McLaughlin* or *Kinder*.

In *State v. Glass*, 136 S.W.3d 496, 515 (Mo. banc 2004), the defendant was convicted of first degree murder, and the jury also was instructed on conventional second degree murder. On appeal, the defendant raised error in the failure to submit an involuntary manslaughter instruction. *Id.* Again, because the second degree murder instruction tested the mental state of the crime of conviction – first degree murder and deliberation – "'no reasonable basis exists to suggest that the jury would have reduced the conviction had they been presented with' a different lesser included offense instruction." *Id.* (citing *State v. Jones*, 979 S.W.2d 171, 185 (Mo. banc 1998)).

Significantly, this Court's opinion in *Glass*, *supra*, cites the Western District's opinion in *State v. Frost*, *supra*, authored by Judge Breckenridge, as supporting authority for its holding. As mentioned previously, the test that Nathan urges this Court to adopt comes directly from *Frost, supra*, but Respondent urges that the holding of *Frost* is

incorrect.[4] However, in adopting the *Frost* test, this Court could leave its previous opinions intact while acknowledging and applying the reasoning from those cases to its post-*Jackson* case law.

Finally, Respondent suggests that even if this Court adopts the *Frost* test, that Nathan should not benefit from it because Respondent believes that the evidence supporting the verdict overwhelmingly shows that a homicide was not reckless (Resp. Br. 37, 39). Nathan's opening brief recites the numerous reasons why the jury could have easily found involuntary manslaughter, and the *Frost* test acknowledges that the jury was not given the opportunity to evaluate the evidence in light of a proper instruction – an instruction that tested its resolve on the differential element of the defendant's mental state. If such instructional error occurred, then prejudice should be presumed precisely because the jury is the sole and final arbiter of the facts. Neither the Respondent nor this Court should substitute its judgment on whether the strength or sufficiency of the evidence for the crime of conviction satisfies a prejudice analysis. This is because the sufficiency to support the verdict of "knowingly" discounts all evidence that supports recklessness. And this Court has rejected attempts to characterize a prejudice argument

[4] Respondent seems to suggest that in *Frost*, the voluntary manslaughter instruction did test the firmness of the jury's belief that the defendant acted with a culpable mental state of "knowingly" (Resp. Br. 32). But the *Frost* court held that the involuntary manslaughter instruction was required, precisely because the firmness of the jury's resolve had not been adequately tested.

in the terms of a sufficiency review, i.e., that the evidence in this case does not support a conviction for involuntary manslaughter. *See Pierce*, 433 S.W.3d at 432. The jury – and only the jury – is the final arbiter of what that evidence does and does not prove. *Id.* at 433.

It is clear that there was a basis to acquit Nathan of second degree murder and convict him of involuntary manslaughter based on the differential element of his mental state. The jury did not have to believe that Nathan knowingly caused Stout's death. Indeed, in *Frost*, *supra*, the Court concluded that because the involuntary manslaughter instruction offered a basis that had not been before the jury and thus had yet to be rejected, "a reasonable basis exist[ed] upon which the jury could have exercised greater leniency." *Id.* 49 S.W.3d at 221. Therefore, it could not conclude 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," and remanded the case for a new trial. *Id.*

Similarly, in Nathan's opening brief, he recited numerous reasons why the jury could have found that the evidence supported involuntary manslaughter. Instead of inferring from the evidence that Nathan, in stabbing the victim, was aware that his conduct was practically certain to cause Stout's death, the jury could have inferred from Jorgensen's testimony that, while Nathan participated in stabbing Stout, he consciously disregarded a substantial and unjustifiable risk that doing so would cause Stout's death and that such disregard constituted a gross deviation from the standard of care which a reasonable person would exercise in the situation. Further, because the evidence was

sufficient to prove that Nathan acted with the higher mental state of knowingly, the evidence was necessarily sufficient, pursuant to *Section 562.021.4*, to prove that he acted with the lower mental state of recklessly. *Roberts*, *supra.*

For all of these reasons, this Court must reverse Nathan's conviction and remand for a new trial.

CONCLUSION

Because the trial court erred in refusing to instruct the jury on involuntary manslaughter (Point I), and because the trial court should have declared a mistrial when the prosecutor: continued to elicit uncharged crimes that had been excluded (Point II), argued for the admission of other uncharged crimes evidence loudly at the sidebar conferences where the jury could hear (Point III), and elicited an emotional outburst by the victim's unprepared mother by shocking her with gruesome photos of her dead son (Point IV), this Court must reverse for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify to the following. 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, and this certificate of compliance and service, the reply brief contains **3,014** words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 1st day of August, 2016, an electronic copy of Appellant's Substitute Reply Brief was placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Amy M. Bartholow

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