IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC95430
	)	
	)	
LONNIE L. BROWN,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT, DIVISION TWENTY
THE HONORABLE COLLEEN DOLAN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Lonnie Brown, was convicted following a jury trial in the Circuit Court of St. Louis County of assault in the first degree, Section 565.050, and armed criminal action, Section 571.015.[1] The Honorable Colleen Dolan sentenced appellant to fifteen years imprisonment. This Court transferred this cause on application of appellant; therefore this Court has jurisdiction pursuant to Rule 83.04 and Article V, Section 9, Mo. Const. (as amended 1976).

[1] Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

Appellant, Lonnie Brown, was charged by information filed August 20, 2014, as a persistent offender, with class B felony assault in the first degree and armed criminal action (L.F. 31-33). Prior to trial, defense counsel filed a motion in limine asking to exclude evidence of other crimes, including evidence of appellant's drug sales (L.F. 37-39, Tr. 4-7). That part of the motion was overruled (Tr. 5-7, 121). The court also ruled it would keep out evidence of the alleged victim's juvenile record and municipal warrants, over defense counsel's objections (Tr. 9-11).

At trial, Dylan Whitehead testified that he was staying with his children's mother, Sarah Safari, during the month of August, 2012 (Tr. 130-132). She lived in the Sunswept Apartments in St. Louis County with her sister, Catherine, and her children, Elijah and Levi Whitehead (Tr. 131-132). On the evening of August 6, they were watching television when they heard a loud knock on the door (Tr. 132). According to Dylan, Catherine looked through the peephole, and Dylan went to the door when the caller asked for him (Tr. 138).

Dylan said at trial that the caller was appellant, who had been his neighbor when Dylan lived with his mother (Tr. 139). Dylan said, "what's up" and appellant said "I want to holler at you" (Tr. 140). Appellant was talking on his phone (Tr. 141). Dylan followed appellant outside (Tr. 141). Appellant said to the person on the phone, "I want you to hear this" (Tr. 142). Dylan saw that

appellant had a gun (Tr. 141). Appellant turned, and Dylan saw a flash; according to Dylan, appellant pointed the gun at him and fired (Tr. 142-143).

Dylan turned and ran back into the apartment, falling against the door as he did so (Tr. 144). He had a hole in his shirt and a graze on his back – he believed he had been shot, although a medical examiner who testified for the defense testified that it appeared he had been injured by the metal doorframe, which had been cut into by the bullet (Tr. 145, 175, 283-289). He went to the hospital but they just "patched [him] up" (Tr. 174-175, 181).

After the shooting, Dylan said he saw appellant's truck; "that's how I knew it was Lonnie, his truck was right there" (Tr. 176). He picked appellant out of a photo lineup (Tr. 216-219). The plates on the black truck, parked at the scene, came back registered to Lonnie Brown (Tr. 230). Inside the truck was a box of ammunition (Tr. 231). It was similar caliber to a bullet and cartridge case found at the scene, but could not be matched (Tr. 240-244, 270).

Defense counsel wanted to cross-examine Dylan about his municipal warrants (Tr. 9-11). He made an offer of proof, and Dylan testified that he had warrants in Ferguson and Florissant for stealing (Tr. 185-186). He told the prosecutor about the warrants (Tr. 188). He still needed to pay fines on the municipal charges for failure to appear (Tr. 190-191). He also had a juvenile record for breaking into a house (Tr. 188-190). The offer of proof was overruled (Tr. 191).

Devane Morton testified that he was Dylan's brother (Tr. 192-193). He was appellant's neighbor and they were "partners" (Tr. 193-194). He testified that he met appellant when they first got out of prison (Tr. 194).[2]

Devane said that he spoke with appellant on August 6 and they were not friendly (Tr. 197-198). Appellant kept asking where Devane was, and saying he had something for him (Tr. 198). Devane testified that appellant told him "you know what I got out of prison for" (Tr. 199).[3]

According to Devane, appellant called him back and said since Devane did not tell him where he was, he wanted him to hear something (Tr. 201). Devane described hearing appellant walking, hearing the truck "ding ding ding" with the keys still in the ignition, hearing him knocking on the door and saying, "is Dylan there" (Tr. 202). Appellant hung up the phone, and Devane did not hear anything after that (Tr. 203).

Devane admitted that he was on parole, and "hopes the prosecutor puts in a good word for him with the probation officer" (Tr. 204). It was a week before he

[2] Defense counsel requested a mistrial, which was overruled (Tr. 195-196).

[3] Defense counsel renewed his request for a mistrial, which was overruled (Tr. 199-200). At a break in the testimony, he renewed it a second time based on the testimony about appellant's getting out of prison, but that was again denied (Tr. 225-227).

told the police any of this, and by that time, he was in jail for something else (Tr. 211). He was "smoking weed" at the time of the incident (Tr. 206).

The jury was instructed on assault in the first degree as follows:

INSTRUCTION NO. 6

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

That on or about August 6, 2012, in the County of St. Louis, State of Missouri, the defendant attempted to kill or cause serious physical injury to Dylan Whitehead by shooting at him,

then you will find the defendant guilty under Count I of assault 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 that offense.

As used in this instruction, a person attempts to kill or cause serious physical injury when, with the purpose of causing that result, he does any act that is a substantial step toward causing that result. A "substantial step" is conduct that is strongly corroborative of the firmness of the actor's purpose to cause that result.

As used in this instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious

disfigurement or protracted loss or impairment of the function of any part of the body.

(L.F. 51). The prosecutor submitted a lesser included offense instruction of assault in the second degree, which the court gave to the jury (L.F. 52, Tr. 302).

INSTRUCTION NO. 7

As to Count I, if you do not find the defendant guilty of assault in the first degree as submitted in Instruction No. 6, you must consider whether he is guilty of assault in the second degree as submitted in this instruction.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

That on or about August 6, 2012, in the County of St. Louis, State of Missouri, the defendant attempted to cause physical injury to Dylan Whitehead by means of a deadly weapon by shooting at him, then you will find the defendant guilty under Count I of assault in the second degree under this instruction.

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 that offense under this instruction.

As used in this instruction, a person attempts to cause physical injury by means of a deadly weapon when, with the purpose of causing that result, he does any act that it is a substantial step toward causing that result by that

means. A "substantial step" is conduct that is strongly corroborative of the firmness of the actor's purpose to cause that result.

(L.F. 52).

Defense counsel requested a lesser included offense instruction of assault in the third degree (Tr. 316, L.F. 58-59). It read:

INSTRUCTION NO. A

As to Count I, if you do not find the defendant guilty of assault in the first degree as submitted in Instruction No. I, and if you do not find the defendant guilty of assault in the 2nd degree as submitted in Instruction No. 7, you must consider whether he is guilty of assault in the third degree as submitted in this instruction.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

That on or about August 6, 2012, in the County of St. Louis, State of Missouri, the defendant recklessly created a grave risk of death or serious physical injury to Dylan Whitehead by shooting at him, then you will find the defendant guilty under Count I under this instruction of assault in the third 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 that offense under this instruction.

As used in this instruction, the term "recklessly" means to consciously disregard 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 that a reasonable person would exercise in the situation.

As used in this instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.

As used in this instruction, a person attempts to cause physical injury when, for the purpose of causing that result, he does an act which is a substantial step towards causing that result. A substantial step is conduct which is strongly corroborative of the firmness of the person's purpose to cause that result.

MAI-CR3d 319.16

Submitted by Defendant

(L.F. 58-59). The court refused the instruction (Tr. 306).

The jury returned verdicts of guilty (L.F. 63-64, Tr. 338). On October 23, 2014, the Honorable Colleen Dolan sentenced appellant to fifteen years imprisonment (L.F. 77-80, Tr. 341, 348). Notice of appeal was filed October 24, 2014 (L.F. 82).

POINTS RELIED ON

I.

The trial court erred in refusing to instruct the jury on third degree assault for recklessly creating a grave risk of death or serious physical injury to Dylan by shooting at him, because that offense is a lesser included offense of first degree assault by attempting to kill or cause serious physical injury to Dylan by shooting at him, and failing to so instruct the jury violated Section 556.046 and appellant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser since the jury could have found that appellant was reckless and not intentional in his conduct of shooting at Dylan.

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

State v. Nutt, 432 S.W.3d 221 (Mo. App., W.D. 2014);

State v. Roberts, 465 S.W.3d 899 (Mo. banc 2015);

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

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

Sections 556.046, 562.016 and 562.021; and

MAI-CR3d 319.16.

II.

The trial court abused its discretion in overruling defense counsel's requests for a mistrial after state's witness Devane Morton repeatedly volunteered that appellant had been in prison, because this testimony violated appellant's rights to due process, a fair trial, and to be tried only for the offense charged, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that Devane's comments informed the jury that appellant had prior felonies, which was inadmissible since appellant did not testify, and only a mistrial could purge the taint of these improper comments.

State v. Quinn, 693 S.W.2d 198 (Mo. App., E.D. 1985);

State v. Dudley, 912 S.W.2d 525 (Mo. App., W.D. 1995);

State v. Helm, 892 S.W.2d 743 (Mo. App., E.D. 1994);

State v. Conley, 873 S.W.2d 233 (Mo. banc 1994);

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

Mo. Const., Art. I, Secs. 10, 17 and 18(a); and

Rule 29.11.

III.

The trial court abused its discretion in sustaining the state's objection to defense counsel's offer of proof regarding evidence of Dylan's juvenile record and municipal warrants, because this ruling violated appellant's right to confront and cross-examine the witnesses against him under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that defense counsel was not permitted to adduce evidence that Dylan therefore had a motive to lie and cooperate with the prosecution.

Davis v. Alaska, 415 U.S. 308 (1974);

State v. Joiner, 823 S.W.2d 50 (Mo. App., E.D. 1991);

State v. Howard, 693 S.W.2d 888 (Mo. App., W.D. 1985);

State v. Thomas, 118 S.W.3d 686 (Mo. App., W.D. 2003);

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

Mo. Const., Art. I, Sec. 18(a).

ARGUMENT

I.

The trial court erred in refusing to instruct the jury on third degree assault for recklessly creating a grave risk of death or serious physical injury to Dylan by shooting at him, because that offense is a lesser included offense of first degree assault by attempting to kill or cause serious physical injury to Dylan by shooting at him, and failing to so instruct the jury violated Section 556.046 and appellant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser since the jury could have found that appellant was reckless and not intentional in his conduct of shooting at Dylan.

Standard of review

Review of the trial court's refusal to give a lesser included offense instruction under Section 556.046 is *de novo.* ***State v. Jackson***, 433 S.W.3d 390, 395 (Mo. banc 2014). "[I]f the statutory requirements for giving such an instruction are met, a failure to give a requested instruction is reversible error." ***Id***.

Analysis

The trial court erred in refusing to instruct the jury on the lesser included offense of assault in the third degree. There was a basis in the evidence for the jury to acquit appellant of assault in the first degree and convict him only of the lesser offense of assault in the third degree since, in the light most favorable to appellant, the evidence demonstrated that appellant acted recklessly rather than while attempting to cause death or serious physical injury to Dylan Whitehead. Failing to so instruct the jury violated Section 556.046 and deprived appellant of due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Facts

According to Dylan's testimony at trial, when appellant came to his door and asked to speak to him, he was talking on his phone (Tr. 141). Dylan followed appellant outside (Tr. 141). Appellant said to the person on the phone, "I want you to hear this" (Tr. 142). Dylan saw that appellant had a gun (Tr. 141). Appellant turned, and Dylan saw a flash; according to Dylan, appellant pointed the gun at him and fired (Tr. 142-143).

Dylan had a hole in his shirt and a graze on his back – he believed he had been shot, although a medical examiner who testified for the defense testified that it appeared he had been injured by the metal doorframe, which had been cut into

by the bullet (Tr. 145, 175, 283-289). He went to the hospital but they just "patched [him] up" (Tr. 174-175, 181).

The jury was instructed on assault in the first degree as follows:

INSTRUCTION NO. 6

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

That on or about August 6, 2012, in the County of St. Louis, State of Missouri, the defendant attempted to kill or cause serious physical injury to Dylan Whitehead by shooting at him,

then you will find the defendant guilty under Count I of assault 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 that offense.

As used in this instruction, a person attempts to kill or cause serious physical injury when, with the purpose of causing that result, he does any act that is a substantial step toward causing that result. A "substantial step" is conduct that is strongly corroborative of the firmness of the actor's purpose to cause that result.

As used in this instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious

disfigurement or protracted loss or impairment of the function of any part of the body.

(L.F. 51). The prosecutor submitted a lesser included offense instruction of assault in the second degree, which the court gave to the jury (L.F. 52, Tr. 302).

INSTRUCTION NO. 7

As to Count I, if you do not find the defendant guilty of assault in the first degree as submitted in Instruction No. 6, you must consider whether he is guilty of assault in the second degree as submitted in this instruction.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

That on or about August 6, 2012, in the County of St. Louis, State of Missouri, the defendant attempted to cause physical injury to Dylan Whitehead by means of a deadly weapon by shooting at him, then you will find the defendant guilty under Count I of assault in the second degree under this instruction.

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 that offense under this instruction.

As used in this instruction, a person attempts to cause physical injury by means of a deadly weapon when, with the purpose of causing that result, he does any act that it is a substantial step toward causing that result by that

means. A "substantial step" is conduct that is strongly corroborative of the firmness of the actor's purpose to cause that result.

(L.F. 52).[4]

Defense counsel requested a lesser included offense instruction of assault in the third degree (Tr. 316, L.F. 58-59). It read:

INSTRUCTION NO. A

As to Count I, if you do not find the defendant guilty of assault in the first degree as submitted in Instruction No. I, and if you do not find the defendant guilty of assault in the 2nd degree as submitted in Instruction No. 7, you must consider whether he is guilty of assault in the third degree as submitted in this instruction.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

That on or about August 6, 2012, in the County of St. Louis, State of Missouri, the defendant recklessly created a grave risk of death or serious physical injury to Dylan Whitehead by shooting at him, then you will find

[4] Although defense counsel did not object at trial to the giving of the second degree instruction (Tr. 302), it arguably is not a lesser at all. It not only changed the mental state from "attempted to kill or cause serious physical injury" to "attempted to cause physical injury," but it added another element of "by means of a deadly weapon." (L.F. 51-52).

the defendant guilty under Count I under this instruction of assault in the third 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 that offense under this instruction.

As used in this instruction, the term "recklessly" means to consciously disregard 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 that a reasonable person would exercise in the situation.

As used in this instruction, the term "serious physical injury" means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body.

As used in this instruction, a person attempts to cause physical injury when, for the purpose of causing that result, he does an act which is a substantial step towards causing that result. A substantial step is conduct which is strongly corroborative of the firmness of the person's purpose to cause that result.

MAI-CR3d 319.16

Submitted by Defendant

(L.F. 58-59). The prosecutor objected that the instruction was not a proper lesser included offense of the assault *second* instruction that the state had submitted (Tr. 304). Defense counsel responded that it was a "stand alone" lesser (Tr. 305). The court refused the instruction (Tr. 306).

Discussion

In arguing that the proposed assault third instruction was not a proper lesser offense to the assault second instruction, the prosecutor missed the point. The state could submit any lesser included offense supported by the evidence – so could the defense.[5] Assault in the third degree as submitted by defense counsel is a lesser included offense of assault in the first degree. ***State v. Hibler***, 5 S.W.3d 147 (Mo. banc 1999); *also see*, ***State v. Nutt***, 432 S.W.3d 221 (Mo. App., W.D. 2014) (assault in the third degree for attempting to cause physical injury to another person was lesser included offense of assault in the first degree).

The trial court erred in refusing the lesser included offense instruction of assault in the first degree, when it failed to "resolve all doubts regarding the evidence in favor of instructing on the lower offense." ***State v. Mizanskey***, 901 S.W.2d 95, 99 (Mo. App., W.D. 1995). This court looks at the evidence in the

[5] In fact, the state's lesser included offense instruction was not proper – see Note 4, *supra.*

light most favorable to the defendant. ***State v. Howard***, 949 S.W.2d 177, 180 (Mo. App., E.D. 1997).

Both the instruction on assault in the first degree that was given and the instruction on assault in the third degree that was offered required the jury to find that appellant shot at Dylan (L.F. 51, 58). The only distinction between the two was the difference in the mental element: the first degree instruction required the jury to find attempt to kill or cause serious physical injury; the third degree instruction recklessly create a grave risk of death or serious physical injury. In other words – purposeful versus reckless conduct.

Purposeful cannot be established without inherently proving reckless. A person acts recklessly if 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 which a reasonable person would exercise in the situation." Section 562.016.4. Section 562.021.4 provides in fact that each culpable mental state is included in higher mental states. That section provides that "[w]hen recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly."

In ***Jackson***, the Missouri Supreme Court reaffirmed that it is the jury's prerogative to determine which evidence to accept or reject:

> [T]he 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 only by one differential element for which the state bears the burden of proof.

433 S.W.3d at 401. While the jury could have inferred from the evidence that appellant acted purposely, the jury also could have drawn a different inference from the evidence and concluded that he acted recklessly. If a reasonable juror could draw inferences from the evidence presented that the defendant acted recklessly, the trial court should instruct down. ***State v. Hineman,*** 14 S.W.3d 924, 927-928 (Mo. banc 1999).

In ***State v. Roberts***, 465 S.W.3d 899 (Mo. banc 2015), and its companion case, ***State v. Randle***, 465 S.W.3d 477 (Mo. banc 2015), this Court held that a defendant is entitled, upon proper request, to an instruction on a "nested" lesser-included offense – i.e., an offense separated from the greater offense by one differential element for which the state bears the burden of proof. "[T]he 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 only by one differential element for which the state bears the burden of proof." ***Roberts***, 465 S.W.3d at 901-902, quoting ***Jackson***, 433 S.W.3d at 401.

In ***Roberts***, the State had argued that third-degree domestic assault was not a "nested" lesser-included offense within the offense of second-degree domestic assault because the different mental states did not constitute differential elements. 465 S.W.3d at 902. This Court rejected the State's argument, explaining that

third-degree domestic assault is a "nested" lesser-included offense of second-degree domestic assault because the different mens rea requirements between the two are differential elements on which the State bears the burden of proof. ***Id.*** This Court further explained that Section 562.021.4 provides that "knowingly" engaging in criminal conduct establishes that the conduct was also "reckless." ***Id.*** Therefore, if Mr. Roberts "knowingly" inflicted physical injury, he necessarily engaged in conduct sufficient to establish that he "recklessly" inflicted physical injury. ***Id.*** at 902-903.

Respondent asserted in the Court of Appeals that this Court must analyze the prejudice resulting from the trial court's error in failing to properly instruct on the nested lesser-included offense of assault in the third degree. Respondent argued that because the lesser included offense instruction of assault second was given, and not found by the jury, appellant suffered no prejudice from the trial court's failure to further instruct on assault third. But the assault second instruction did not test the mental state element of the assault first instruction in the same way that an assault third instruction would have done.

"[W]here 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* ***State v. Frost***, 49 S.W.3d at 212, 219-20 (Mo. App., W.D. 2001); ***Nutt***, 432 S.W.3d at 224-25.

In ***Frost,*** 49 S.W.3d at 216, the jury convicted Ms. Frost of the greater offense when presented with the options of second-degree murder and voluntary manslaughter. The second-degree murder instruction required that the jury find that Ms. Frost did not act under the influence of sudden passion, but in all other respects, the instruction were virtually identical. ***Id***. at 222. On appeal, Frost raised as error the trial court's failure to also give an involuntary manslaughter instruction. ***Id***. at 216.

The State's claim on appeal was that there was no prejudice to Frost because this Court had consistently held that when a jury is presented with instructions on both first-degree and second-degree murder and it finds the defendant guilty of murder in the first degree, no prejudice results from a court's failure to give an instruction on an even lesser-included offense. *See* ***State v. Hall***, 982 S.W.2d 675, 682 (Mo. banc 1998). In reversing Frost's conviction, the Western District could not find 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. The Court noted that the second-degree murder and voluntary manslaughter instructions asked whether the defendant acted purposefully and that the sole different element between the two was whether the defendant did so under the influence of sudden passion. ***Frost***, 49 S.W.3d at 219-20. However, the proffered involuntary manslaughter instruction asked whether the defendant acted purposefully in causing the victim's death, but did so with 'an unreasonable belief' in using deadly force to preserve her life. ***Id.***

at 220. 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.*** 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***.

Likewise, in ***Nutt***, the elements of first-degree assault were not adequately tested. 432 S.W.3d at 225. The proffered third-degree assault instruction asked whether Mr. Nutt attempted to cause physical injury. ***Id.*** The submitted first and second-degree assault instructions did not ask that question, but rather asked whether Mr. Nutt's attempt to cause serious physical injury was done with sudden passion. ***Id.*** Because the jury did not have before it a question of whether Mr. Nutt intended his actions to cause only physical injury, the Court could not conclude that the elements of first-degree assault were adequately tested by the second-degree assault instruction. ***Id.*** Accordingly, Mr. Nutt was prejudiced by the trial court's refusal of his instruction for third-degree assault and his conviction and sentence were reversed. ***Id.***

Here, the sole differentiating element between the first and second degree assault instructions was whether appellant attempted to cause serious physical injury or merely physical injury (L.F. 51-52). But the second degree instruction did not test whether the jury might have found that appellant acted with a lesser

mental state. Under such circumstances, this Court cannot say that the jury was adequately tested on the elements of assault in the first degree to the extent that submission of assault in the third degree would have made no difference.

Instead of inferring from the evidence that appellant attempted to cause death or serious physical injury to Dylan, the jury could have found that appellant consciously disregarded a substantial and unjustifiable risk that he would cause serious physical injury or death to Dylan 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 appellant acted with the higher mental state, 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.*

The trial court should have given the jury every alternative that was supported by the evidence. This Court should therefore reverse appellant's conviction of first degree assault as well as the concomitant conviction of armed criminal action and remand for a new trial.

II.

The trial court abused its discretion in overruling defense counsel's requests for a mistrial after state's witness Devane Morton repeatedly volunteered that appellant had been in prison, because this testimony violated appellant's rights to due process, a fair trial, and to be tried only for the offense charged, guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that Devane's comments informed the jury that appellant had prior felonies, which was inadmissible since appellant did not testify, and only a mistrial could purge the taint of these improper comments.

Standard of Review

The decision to grant a mistrial is a matter for the sound discretion of the trial court. ***State v. Witte***, 37 S.W.3d 378, 383 (Mo. App., S.D. 2001). The decision should be honored by the appellate courts unless there is a clear showing in the record that the trial court abused its discretion. ***Id.***

Facts

Devane Morton testified that he was Dylan's brother (Tr. 192-193). He was appellant's neighbor and they were "partners" (Tr. 193-194). He testified that he met appellant when they first got out of prison (Tr. 194). Defense counsel requested a mistrial, which was overruled (Tr. 195-196).

Devane said that he spoke with appellant on August 6 and they were not friendly (Tr. 197-198). Appellant kept asking where Devane was, and saying he had something for him (Tr. 198). Devane testified that appellant told him "you know what I got out of prison for" (Tr. 199). Defense counsel renewed his request for a mistrial, which was overruled (Tr. 199-200). At a break in the testimony, he renewed it a second time based on the testimony about appellant's getting out of prison, but that was again denied (Tr. 225-227).

Defense counsel included this claim in his timely filed motion for new trial (L.F. 71-72). It is preserved for this Court's review. Rule 29.11.

Discussion

As a general rule, evidence of other crimes is inadmissible if it is offered to show that a defendant is a person of bad character or has a propensity to commit crimes. ***State v. Conley***, 873 S.W.2d 233, 236 (Mo. banc 1994). Evidence of other crimes should be utilized only when there is strict necessity. ***State v. Helm***, 892 S.W.2d 743, 745 (Mo. App., E.D. 1994). Trial courts should be wary of evidence concerning other crimes because the admission of this kind of proof "tends to run counter to the rule that forecloses using an accused's character as the basis for inferring guilt." ***State v. Dudley***, 912 S.W.2d 525, 528 (Mo. App., W.D. 1995). The admission of other crimes evidence which is not properly related to the cause on trial violates the defendant's right to be tried for the offense with

which he is charged by the information. Mo. Const., Art. I, Section 18(a); ***State v. Dunn***, 309 S.W.2d 643, 645 (Mo. banc 1958).

Evidence of other crimes must be both logically and legally relevant to be admissible. ***State v. Bernard***, 849 S.W.2d 10, 13 (Mo. banc 1993). Logical relevance means that the proffered evidence tends to directly establish a defendant's guilt. ***Id***. For evidence to be considered legally relevant, its prejudicial effect must be outweighed by its probative value. ***Id***. While a defendant's propensity to commit a crime may be logically relevant, it is not legally relevant because the prejudicial effect of such evidence outweighs its probative value. ***Dudley***, 912 S.W.2d at 528. The probative value of other crimes evidence increases when it can be shown that the evidence is offered to prove an issue other than propensity or bad character. ***Id***. Evidence that a defendant has been in prison is evidence that the defendant has committed other crimes. ***State v. Laws***, 668 S.W.2d 234 (Mo. App., E.D. 1984).

Mistrial

The declaration of a mistrial is a drastic remedy, which should only be employed where the resulting prejudice cannot be removed any other way. ***State v. Schneider***, 736 S.W.2d 392, 400 (Mo. banc 1987), ***cert. denied***, 484 U.S. 1047 (1988). However, "[i]t is a fundamental concept of criminal law that an accused, whether guilty or innocent, is entitled to a fair trial, so it is the duty of the trial

court, . . . , to see that he gets one. . . ." ***State v. Tiedt***, 357 Mo. 115, 206 S.W.2d 524, 526 (banc 1947).

In ***State v. Quinn***, 693 S.W.2d 198 (Mo. App., E.D. 1985), the defendant's conviction was reversed and remanded for a new trial when a detective testified at trial that he showed the victim a photo lineup from "department photographs." The ***Quinn*** court noted that such testimony could raise a suspicion in the minds of the jurors that the defendant had engaged in prior criminal activity. ***Id.*** at 200. But the officer continued on and soon thereafter testified that he was referring to his "robbery books" and "crime books," establishing as fact that the defendant had a criminal record. ***Id.*** The court noted, "[b]y overruling defense counsel's objection, the trial court gave its seal of approval to the consideration of that evidence by the jury. Further the defendant did not testify and subject himself to proper cross-examination on his prior convictions." ***Id.***

A mistrial was the only way to purge the taint of these improper comments. Once the bell had been rung, it could not be unrung. ***State v. Shepard***, 654 S.W.2d 97, 101 (Mo. App., W.D. 1983). When evidence of uncharged misconduct is introduced to show the defendant's propensity to commit such crimes, the jury may improperly convict the defendant because of his propensity without regard to whether he is actually guilty of the charged crime. ***State v. Carter***, 996 S.W.2d 141, 143 (Mo. App., W.D. 1999), ***citing***, ***State v. Burns***, 978 S.W.2d 759, 761 (Mo. banc 1998).

A mistrial was the only way to cure such an error once the words were out of Devane's mouth. Even though the prosecutor apparently did not solicit the statements, he made them over and over. This Court must reverse appellant's convictions and remand for a new and fair trial.

III.

The trial court abused its discretion in sustaining the state's objection to defense counsel's offer of proof regarding evidence of Dylan's juvenile record and municipal warrants, because this ruling violated appellant's right to confront and cross-examine the witnesses against him under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution, in that defense counsel was not permitted to adduce evidence that Dylan therefore had a motive to lie and cooperate with the prosecution.

Trial courts have discretion to determine the relevancy of evidence, and appellate courts will reverse that determination only upon a showing of abuse of discretion. ***State v. Wolfe***, 13 S.W.3d 248, 258 (Mo. banc 2000). The trial court here abused its discretion in sustaining the State's objection to defense counsel's offer of proof of evidence of Dylan's juvenile record and municipal warrants. Dylan was the only witness who testified that appellant was the shooter (Tr. 142-143).

An accused in a criminal prosecution has the right to confront the witnesses against him. ***Crawford v. Washington***, 541 U.S. 36 (2004); U.S. Const. Amend. VI; Mo. Const. Art. I § 18(a). This right is extended to the states, ***Delaware v. Van Arsdall***, 475 U.S. 673, 680 (1986), and includes the opportunity to cross-examine the witness to expose any motivation, including potential bias or

prejudice, which may influence his testimony. ***Davis v. Alaska***, 415 U.S. 308, 315-317 (1974); ***State v. Leisure***, 796 S.W.2d 875, 880 (Mo. banc 1990).

In ***State v. Joiner***, the Eastern District held that a defendant in a criminal prosecution has a constitutional right to cross-examine the witness, for the purpose of showing possible motive or self-interest on criminal charges presently pending by efforts of the same prosecutor. 823 S.W.2d 50, 53 (Mo. App., E.D. 1991). Under such circumstances there is a possible motivation to testify favorably for the prosecutor even if no deal is pending or likely. ***Id***. It is sufficient that the witness might perceive a possible benefit. ***Joiner***, 823 S.W.2d at 53. The extent of the examination is within the discretion of the trial court but the court may not wholly exclude the issue. ***Id***.

Defense counsel wanted to cross-examine Dylan about his municipal warrants (Tr. 9-11). He made an offer of proof, and Dylan testified that he had warrants in Ferguson and Florissant for stealing (Tr. 185-186). He told the prosecutor about the warrants (Tr. 188). He still needed to pay fines on the municipal charges for failure to appear (Tr. 190-191). He also had a juvenile record for breaking into a house (Tr. 188-190). The offer of proof was overruled (Tr. 191).

When showing bias, it is not necessary to prove the existence of a deal or the state's willingness or unwillingness to deal. ***Id***. at 54. What is relevant is the witness' knowledge of these facts, his perception of expectancy of favorable treatment if he furthers the state's case, or his basis to fear harsh treatment if his

testimony is unfriendly. ***Id***. And while these charges were not from the same prosecutor, Dylan testified that he told the prosecutor about the warrants. The jury should have been able to consider his bias and motive to testify favorably for the state.

Here, the court's ruling prohibiting the defense from exploring fully Dylan's possible motive to testify favorably for the state was in error and this error was not harmless. In ***State v. Thomas***, 118 S.W.3d 686 (Mo. App., W.D. 2003), the Court reversed the defendant's conviction of second degree murder where defense counsel was not permitted to cross-examine witnesses about their pending criminal charges.

Furthermore, the state's interest in protecting the records of juveniles can give way to a defendant's need to expose possible bias in the witnesses. ***Davis v. Alaska***, 415 U.S. at 320. The Sixth Amendment right of an accused to confront witnesses against him includes the right to cross-examine these witnesses for bias. 415 U.S. at 315. In ***State v. Howard***, 693 S.W.2d 888 (Mo. App., W.D. 1985), the Western District of this Court reversed the appellant's conviction of robbery in the second degree where the trial court had excluded evidence of the victim's juvenile offender status and record where that exclusion violated the defendant's right to confrontation.

The trial court erred in overruling the offer of proof regarding Dylan's warrants and juvenile record. This Court should reverse appellant's convictions and remand for a new and fair trial.

CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Ellen H. Flottman, 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 in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,455 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 12th day of August, 2016, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were served through the Missouri e-Filing System on Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Ellen H. Flottman

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