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 REPLY BRIEF

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
Woodrail Centre, 1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977, ext. 323
FAX (573) 777-9974
E-mail: Ellen.Flottman@mspd.mo.gov

INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from his original substitute brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from his original substitute brief.

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. [1]

Respondent's argument rests on a faulty premise. Respondent concedes error but says there is no prejudice for the trial court's failure to give an assault in the third degree instruction. Respondent bases this conclusion on his argument that assault in the third degree is not a lesser included offense of assault in the second degree as instructed. Respondent has missed the point. Assault in the third

[1] Appellant replies only to Point I and stands on his original brief as to Points II and III.

degree is a nested lesser included offense of assault in the *first* degree as instructed, and it was prejudicial error for the trial court to refuse this instruction.[2]

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). Furthermore, it is a *nested* lesser included offense under ***State v. Randle***, 465 S.W.3d 477 (Mo. banc 2015), and ***State v. Roberts***, 465 S.W.3d 899 (Mo. banc 2015).

Respondent argues that attempt to kill or cause serious physical injury is somehow different than a "purposeful" mental state under Section 562.016.2. But the Missouri Supreme Court has held "attempt to kill" to equate to "purposeful" in ***State v. Whalen***, 49 S.W.3d 181, 186 (Mo. banc 2001). And under Section 562.016.4 and ***Randle*** and ***Roberts***, knowingly is nested in purposely. Recklessly is nested in knowingly. Recklessly is nested in purposely. Third degree assault is nested in first degree assault.

The statute says, "When recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly." Section 562.021.4. While the jury could have inferred from the evidence that appellant

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[2] Appellant concedes Respondent's footnote 2. Resp. br. 10 n. 2. Assault in the second degree is a statutory lesser included offense of assault in the first degree under Section 556.045.1(2). Under the facts of this case, however, it does not meet the elements test as given. See App. Br. 20 n. 4.

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).

Respondent agrees that it was error for the trial court to refuse the submitted assault in the third degree instruction, and bases its entire argument on cases that held no prejudice from this error, since the assault in the second degree instruction was given (Resp. br. 9). To the contrary, under the facts of this case and the current state of the law, prejudice should be presumed.

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)).

Respondent also acknowledges ***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), relied on in appellant's opening brief, which hold 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. But respondent asks this Court to hold that when *any* 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) adequately tests the reliability of the jury's verdict. (Resp. br. at 20). However, 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 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.

Furthermore, respondent's argument simply does not make sense. If the evidence supports a finding that appellant acted recklessly, as respondent has conceded, but the jury was *not instructed* on any lesser included offense that gave this as an option, how can there not be prejudice? Respondent's argument is a tautology.

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[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.

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.

CONCLUSION

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

Respectfully submitted,

/s/ Ellen H. Flottman

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
Woodrail Centre, 1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone: (573) 777-9977, ext. 323
FAX: (573) 777-9974
E-mail: Ellen.Flottman@mspd.mo.gov

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, and this certificate of compliance and service, the brief contains 1,236 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

On this 13th day of October, 2016, an electronic copy of Appellant's Substitute Reply Brief was served through the Missouri e-Filing System on Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Ellen H. Flottman

Ellen H. Flottman