No. SC95430

IN THE

# Supreme Court of Missouri

**STATE OF MISSOURI**,

*Respondent*,

v.

**LONNIE L. BROWN**,

*Appellant*.

Appeal from the St. Louis County Circuit Court
Twenty-first Judicial Circuit
The Honorable Colleen Dolan, Judge

## RESPONDENT'S SUBSTITUTE BRIEF

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## STATEMENT OF FACTS

Mr. Brown appeals his convictions of the class B felony of assault in the first degree, § 565.050, RSMo 2000, and the unclassified felony of armed criminal action, § 571.015, RSMo 2000 (L.F. 77). He asserts three claims on appeal: (1) that the trial court erred in refusing to instruct the jury on the included offense of assault in the third degree, (2) that the trial court abused its discretion in denying a request for mistrial after a witness "repeatedly volunteered that [Mr. Brown] had been in prison"; and (3) that the trial court abused its discretion "in sustaining the state's objection to defense counsel's offer of proof regarding evidence of [the victim's] juvenile record and municipal warrants" (App.Br. 13-15).

* * *

On the evening of August 6, 2012, Dylan Whitehead (Victim) was home with his children, his children's mother (Mother), and Mother's sister (Aunt) (Tr. 131-132). They were eating dinner and watching television, and Victim was holding his two-week-old baby (Tr. 132). Victim heard a loud knock at the door (Tr. 132, 138; *see* Tr. 201-202).

Aunt looked out through the peep hole and asked who was there, and Mr. Brown (who was at the door) asked if Victim was home (Tr. 138; *see* Tr. 202). Victim went to the door and opened it and said, "Hey, what's up?" (Tr. 139). Mr. Brown was Victim's neighbor (Tr. 139). Mr. Brown said, "I'm going

to holler at you. Let me holler at you" (Tr. 139). Victim saw that Mr. Brown was on the phone with someone (Tr. 141).[1]

Victim said he was going to put on some shoes, but Mr. Brown said, "You don't need to [sic] no shoes. Let me talk to you" (Tr. 141). Victim handed his baby to Mother and started to walk outside (Tr. 141-142). Mr. Brown stayed on the phone, but as he walked down the steps, he reached into his pants (Tr. 141).

Victim saw something shiny and silver, and he wondered what was going on (Tr. 141). Victim's "mind was moving like a mile a minute" (Tr. 141). Victim realized that Mr. Brown had a gun, and he wondered if he should keep walking (Tr. 141). Victim wondered, "Is it for me? Is he trying to find somebody else outside?" (Tr. 141). Victim's first reaction was to go back inside the house (Tr. 141).

Victim heard Mr. Brown say to someone on the phone, "I want you to hear this" (Tr. 142). Victim said, "Lonnie, what's up?" (Tr. 142). Mr. Brown

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[1] Mr. Brown was on the phone with Victim's brother (Tr. 201-202). Mr. Brown said to Victim's brother, "I want you to hear something" (Tr. 201-202). Victim's brother heard Mr. Brown knock on the door and ask for Victim (Tr. 200). When Victim's brother heard Mr. Brown ask for Victim, he "went f---ing ballistic" (Tr. 202).

turned around and fired his gun at Victim (Tr. 142-143). Victim saw "a flash," and he tried to take cover (Tr. 142). Victim ran back into his apartment (Tr. 144). Victim stumbled inside the door (Tr. 144). The children, Mother, and Aunt were screaming, and Victim locked the door (Tr. 145). Aunt called the police (Tr. 145). Victim suffered a graze wound on his back (Tr. 145-148).

At the hospital, Victim viewed a photo line-up and identified Mr. Brown as the shooter (Tr. 219). Victim identified Mr. Brown by name (Tr. 219). A search of Mr. Brown's truck revealed a box of .45-caliber ammunition (Tr. 230-232). A fired shell casing was found at the scene, and the manufacturer's "head stamp" on the expended casing matched the stamp on the ammunition found in Mr. Brown's truck (Tr. 240, 269-270). An expended bullet was recovered from a wall at the scene, and subsequent examination revealed that the expended bullet was a .45-caliber bullet (Tr. 242-243, 269).

Ultimately, the State charged Mr. Brown with the class B felony of assault in the first degree, § 565.050, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000 (L.F. 31). The State also alleged, and the trial court found, that Mr. Brown was a prior and persistent offender (L.F. 32, 34).

At trial, Mr. Brown offered the testimony of Dr. Jane Turner, a medical examiner, who testified that, after reviewing the evidence in the case, she concluded that Victim's injury was not caused by a bullet (Tr. 284). In her opinion, the injury appeared to be "a sharp force injury" (Tr. 285). She

suggested that Victim might have been injured by the damaged metal door after the door was hit by the bullet (Tr. 288-289).

As to Count I, the trial court instructed the jury on the charged offense of assault in the first degree (L.F. 51; Tr. 307). The trial court also instructed the jury on the included offense of assault in the second degree (L.F. 52; Tr. 307). The trial court refused Mr. Brown's instruction for the included offense of assault in the third degree (L.F. 58; Tr. 303-306).

The jury found Mr. Brown guilty of assault in the first degree and armed criminal action (L.F. 63-64; Tr. 338-340). The court sentenced Mr. Brown to two concurrent terms of fifteen years' imprisonment (Tr. 348).

## ARGUMENT

### I.

**The trial court erred in refusing to instruct the jury on the included offense of assault in the third degree; however, Mr. Brown was not prejudiced.**

In his first point, Mr. Brown asserts that the trial court erred in refusing his instruction on the included offense of assault in the third degree (App.Sub.Br. 16). Respondent concedes that the trial court erred in refusing the instruction; however, Mr. Brown was not prejudiced.

**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 erred in refusing to submit an instruction for the included offense of assault in the third degree, but Mr. Brown was not prejudiced**

**1. The trial court erred in refusing the instruction**

"A defendant may be convicted of an offense included in an offense charged in the indictment or information." § 556.046.1, RMSo Cum. Supp. 2013. An offense is an included offense, *inter alia*, when "[i]t is specifically denominated by statute as a lesser degree of the offense charged." *See* § 556.046.1(2), RSMo Cum. Supp. 2013.

Mr. Brown was charged with assault in the first degree (L.F. 31). The offense of assault in the third degree was, thus, an included offense. "The law recognizes third-degree assault to be a lesser included offense of first- and second-degree assault." *State v. Nutt*, 432 S.W.3d 221, 223 (Mo.App. W.D. 2014); *see also State v. Whalen*, 49 S.W.3d 181, 188 (Mo. 2001) ("Assault,

second degree, is prescribed by statute as a lesser included offense of assault, first degree.").[2] Accordingly, the initial 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. Brown made a timely request (Tr. 303). Additionally, there was both a basis to acquit Mr. Brown of the immediately higher included offense and a basis to convict him of the proffered included offense. *See*

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[2] Contrary to the argument in Mr. Brown's footnote 4—that assault in the second degree as submitted was not an included offense because "it added another element of 'by means of a deadly weapon' " (App.Br. 20 n. 4)—it is well settled that assault in the second degree is an included offense of assault in the first degree. While assault in the second degree will not always be an included offense under the "elements" test codified in § 556.046.1(1), it is nevertheless an included offense since, by statute, it is a "lesser degree" of assault in the first degree. *See* 556.046.1(2), RSMo Cum. Supp. 2013.

§ 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.").

First, because the jury did not have to believe or infer that Mr. Brown "attempted to cause physical injury to [Victim]" (as posited in the second-degree assault verdict director) (*see* L.F. 52), there was a basis to acquit of the immediately higher included offense that was submitted to the jury. An "attempt" requires proof that the actor's purpose (or conscious object) was to bring about a particular result, *see* § 556.011.1, RSMo 2000, but the jury did not have to infer from Mr. Brown's conduct that he had that specific intent.

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. Brown of assault in the second degree.

There was also a basis to convict Mr. Brown of the included offense of assault in the third degree. The proffered instruction posited that Mr. Brown "recklessly created a grave risk of death or serious physical injury to [Victim]

by shooting at him" (L.F. 58). As is evident, the conduct alleged in this instruction was the same conduct alleged in the instruction for assault in the second degree, namely, "shooting at [Victim]" (L.F. 52, 58). There is no question that there was a basis in the evidence to support that finding.

But the proffered lesser offense had two substantive differences that had to be supported by the evidence as well. One difference was that the proffered instruction required proof of a particular result, namely, that Mr. Brown's conduct "created a grave risk of death or serious physical injury" to Victim.[3] The evidence showed that a bullet either grazed Mr. Brown or passed very close to him; thus, there was a basis for the jury to find that Mr. Brown's conduct created a grave risk of death or serious physical injury.

The other difference between second-degree assault as submitted in this case and the proffered third-degree assault was the culpable mental state. As discussed above, the second-degree assault instruction required proof that Mr. Brown acted "purposely" in shooting at Victim (*i.e.*, with the

[3] For assault in the second degree, as submitted in this case, Mr. Brown did not have to actually create a "grave risk" or, for that matter, any actual injury to victim; rather, Mr. Brown had to have the specific intent to cause "physical injury" to Victim by means of a deadly weapon (*see* L.F. 52). There was no "result" element for assault in the second degree as submitted.

specific intent to cause physical injury to Victim) (L.F. 52). By contrast, the proffered third-degree assault instruction posited that Mr. Brown acted "recklessly" in shooting at Victim (L.F. 52, 58). Thus, there also had to be a basis for concluding that Mr. Brown had the lesser culpable mental state.

This Court has held that where the only difference between two offenses is that one has a lesser culpable mental state, the lesser offense is a "nested" lesser included offense. *State v. Randle*, 465 S.W.3d 477, 480 (Mo. 2015); *State v. Roberts*, 465 S.W.3d 899, 902-903 (Mo. 2015). As the Court stated in *Randle* and *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 culpable mental state of assault in the third degree was not nested within the culpable mental state of assault in the second degree. As discussed above, the proffered third-degree assault had an additional element of creating a "grave risk" (a "result" element that was not included in the greater offense), and the culpable mental state of "recklessly" was attached to causing that result. On the other hand, the mental state of the greater offense (purposely) was attached to Mr. Brown's conduct, which carried only an intended result (and not an actual result). Thus, contrary to Mr. Brown's argument, the difference was not simply "purposeful versus

reckless conduct" (App.Sub.Br. 23); rather, it was recklessly causing a result (third-degree assault) versus purposely engaging in conduct (second-degree assault). *See generally* § 562.016.2, .4, RSMo 2000 (describing how "acts purposely" attaches to conduct or to a result and "acts recklessly" attaches to a conscious disregard of circumstances or a result). Accordingly, the culpable mental state of assault in the third degree was not "nested" within the culpable mental state of assault in the second degree.

But while not nested, the offense of assault in the third degree (which was an included offense by virtue of § 556.046.1(2)) was supported by possible inferences from the evidence. The defense presented evidence from which the jury could have concluded that Mr. Brown did not hit Victim with a bullet, and the evidence otherwise showed that Mr. Brown fired a gun at Victim from a short distance away, that Mr. Brown was trying to inspire terror in Victim's brother by carrying out his assault while Victim's brother was on the telephone, and that Victim did not suffer any serious physical injury (*see* Tr. 142-148, 201-202, 284-285, 288-289). In light of this evidence, the jury could have concluded that Mr. Brown shot at Victim (without the specific intent to injure him), and that Mr. Brown recklessly created a grave risk of death or serious physical injury to Victim, *i.e.*, that Mr. Brown consciously disregarded a substantial and unjustifiable risk that he would create a grave risk to Victim's life and body. Thus, the trial court erred in refusing to instruct the

jury on assault in the third degree.

**2. The Court should not presume prejudice**

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, however, 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)).

**3. Mr. Brown 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. Brown's trial.[4]

**a. The general rule.** First, a longstanding rule in Missouri is 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

[4] 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.

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) (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 also 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).

Here, the jury found Mr. Brown guilty of assault in the first degree, and it declined to find him guilty of the included offense of assault in the second degree, even though that included offense was submitted to it. Thus, these is no reason to believe that the jury was not firmly convinced of its verdict, *i.e.*, there is no reason to believe that, if given yet another option, the jury would have found Mr. Brown guilty of an even lesser option. *See State v. McCullum*, 63 S.W.3d 242, 252-253 (Mo.App. S.D. 2001) (" '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))).

Mr. Brown relies on *State v. Frost*, 49 S.W.3d 212, 221 (Mo.App. W.D. 2001); and *State v. Nutt*, 432 S.W.3d at 224-225—two cases in which the

Court of Appeals declined to apply the general rule (App.Sub.Br. 25-28). Respondent submits, however, that the analysis in cases like *Frost* and *Nutt* should be reexamined; and, in any event, that cases like *Frost* and *Nutt* are distinguishable from Mr. Brown'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. Brown was prejudiced should not turn on whether the jury had the opportunity to consider specifically whether Mr. Brown "recklessly" shot at Victim. Rather, the question should turn on whether the jury was firm in its belief (*i.e.*, convinced beyond a reasonable doubt) that Mr. Brown acted "purposely" in attempting to kill or cause serious physical injury to Victim. Here, that particular finding was specifically tested by the second-degree assault instruction that posited that

Mr. Brown acted "purposely" in attempting to cause "physical injury" (L.F. 52). The proffered third-degree assault instruction, however, would not have directly tested that particular finding, as it would have directed the jury to consider whether Mr. Brown was reckless as to an actual *result* of his conduct (*see* L.F. 58). In short, the testing provided by the second-degree assault instruction in this case was sufficient to confirm that the jury, in finding Mr. Brown guilty of assault in the first degree, was convinced beyond a reasonable doubt that Mr. Brown had the purpose to kill or cause serious physical injury to Victim.

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. Brown was guilty of assault in the first degree or assault in the second degree (but unwilling to acquit him completely because

he was plainly guilty of something)—chose the more serious offense of first-degree assault rather than second-degree assault 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. Brown guilty of the greater offense of assault in the first 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* and similar cases, the Court should nevertheless find that Mr. Brown 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). 49 S.W.3d at 220. In other words, 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 him guilty of involuntary manslaughter (based on the theory of imperfect self-defense). *See id*.

In *Nutt*, similarly, the Court concluded that "the elements of first-degree assault were not adequately tested." 432 S.W.3d at 225. The Court observed that "[t]he proffered third-degree assault instruction asked whether Mr. Nutt attempted to cause physical injury," and it further observed that "[t]he 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*. Thus, similar to *Frost*, the Court concluded that, "[b]ecause the jury did not have before it a question of whether Mr. Nutt intended his actions to cause only physical injury, [it could not] conclude that the elements of first-degree assault were adequately tested by the second-degree assault instruction." *Id*.[5]

[5] In *State v. Nutt*, there was no claim of self-defense; thus, the case differed from *Frost*. Arguably, however, the evidence that produced the guilty verdict on the charged offense in *Nutt* was equally consistent with finding either that the defendant attempted to inflict "serious physical injury" (the charged offense) or that the defendant attempted to inflict "physical injury" (the lesser offense that was refused), since the difference between the two was only a matter of degree between the intended results. *See* 432 S.W.3d at 224-225.

Here, in direct contrast to *Nutt*, the submitted included offense of assault in the second degree adequately tested the firmness of the jury's conclusion that Mr. Brown "attempted to kill or cause serious physical injury to [Victim]" (L.F. 51). As discussed above, that finding was specifically tested by the second-degree assault instruction that posited that Mr. Brown acted "purposely" in attempting to cause "physical injury" (L.F. 52). The proffered third-degree assault instruction, however, would not have directly tested that particular finding, as it would have directed the jury to consider whether Mr. Brown was reckless as to an actual *result* of his conduct (*see* L.F. 58). In short, the testing provided by the second-degree assault instruction in this case confirmed that the jury, in finding Mr. Brown guilty of assault in the first degree, was convinced beyond a reasonable doubt that Mr. Brown had the purpose to kill or cause serious physical injury to Victim. Moreover, because this case did not involve any allegation of self-defense by Mr. Brown, it is further distinguishable from *Frost*.

Mr. Brown argues that he was prejudiced by the trial court's error because "[i]nstead of inferring from the evidence that [he] attempted to cause death or serious physical injury to Dylan, the jury could have found that [he] consciously disregarded a substantial and unjustifiable risk that he would [create a grave risk of] serious physical injury or death to [Victim] and that such disregard constituted a gross deviation from the standard of care which

a reasonable person would exercise in the situation" (App.Sub.Br. 28).[6] But while this is certainly true, it merely shows that the trial court should have submitted the requested instruction. However, in ascertaining whether there was prejudice, the question is whether there is a reasonable probability that, but for the trial court's error, the jury would have reached a different verdict. For the reasons discussed above, Mr. Brown was not prejudiced.

Lastly, there is no reasonable probability that the proffered instruction would have led the jury to draw different inferences from the evidence. The evidence showed that Mr. Brown lured Victim out of his house, that Mr. Brown apparently planned to commit the shooting while on the telephone with Victim's brother, that Mr. Brown took out his .45 caliber handgun and fired it at Victim, and that Victim suffered an apparent graze wound from the bullet (Tr. 139, 141-148, 200-202, 242-243, 269).

As shown by the verdict, the jury inferred from this evidence that Mr. Brown's purpose was to kill or cause serious injury to Victim—an intent that was evident from Mr. Brown's actions. The jury certainly could have inferred that Mr. Brown was reckless; but, in light of the evidence, there is no

[6] In his brief, instead of stating "create a grave risk of," Mr. Brown states "cause" serious physical injury or death (App.Sub.Br. 28). The element of the offense is "create a grave risk" (*see* L.F. 58).

reasonable probability that the jury would have abandoned its finding that Mr. Brown acted purposely.

In sum, while the trial court erred in refusing the proffered instruction, Mr. Brown was not prejudiced. The failure to give a different included offense instruction is not prejudicial when instructions for the charged offense and one included offense are given and the defendant is found guilty of the higher offense. *See State v. McCullum*, 63 S.W.3d at 252-253. Moreover, Mr. Brown's case is distinguishable from cases like *Frost* and *Nutt*, and there is no reasonable probability that the jury, having inferred that Mr. Brown had the purpose to kill or cause serious physical injury, would have found instead that Mr. Brown recklessly created a grave risk of death or serious physical injury. This point should be denied.

## II.

**The trial court did not abuse its discretion in refusing to grant a mistrial after Devane Morton offered testimony showing that Mr. Brown had previously been in prison.**

In his second point, Mr. Brown asserts that the trial court abused its discretion in "overruling defense counsel's requests for a mistrial after state's witness Devane Morton repeatedly volunteered that [Mr. Brown] had been in prison" (App.Sub.Br. 29). He asserts that this testimony informed the jury that Mr. Brown "had prior felonies, which was inadmissible since [Mr. Brown] did not testify" (App.Sub.Br. 29).

### A. The standard of review

"A trial court has broad discretion to admit or exclude evidence at trial." *State v. Blurton*, 484 S.W.3d 758, 770 (Mo. 2016). "A trial court's decision regarding the exclusion or admissibility of evidence is reviewed for an abuse of discretion." *Id*. "A trial court abuses its discretion only if its decision to admit or exclude evidence is 'clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.' " *Id*.

"Claims of trial court error are reviewed 'for prejudice, not mere error.' " *Id*. "This Court will reverse the trial court's decision only if there is a

reasonable probability that the error affected the outcome of the trial or deprived the defendant of a fair trial." *Id.*

"[A] mistrial 'is a drastic remedy and should be employed only in the most extraordinary circumstances.' " *Id.* at 779. " 'This decision is left to the discretion of the trial court, as it is in the best position to determine whether the incident had a prejudicial effect on the jury.' " *Id.* "A mistrial should only be used 'in those extraordinary circumstances in which the prejudice to the defendant cannot otherwise be removed.' " *Id.*

**B. The trial court did not abuse its discretion in denying Mr. Brown's requests for a mistrial**

Mr. Brown challenges the admission of two pieces of evidence that were offered by Devane Morton, Victim's older brother. The two pieces of evidence, while similar, were very different in nature, however, and they should not be considered in the same light.

At the outset of his testimony, Mr. Morton testified that he met Mr. Brown when they first got out of prison (Tr. 194). This testimony was not proper, as it informed the jury that Mr. Brown had previously been convicted of some unspecified crime.

"A defendant has the right to be tried only on the offense for which he is charged." *State v. Smith*, 353 S.W.3d 100, 104 (Mo.App. W.D. 2011). " 'As a general rule, "evidence of uncharged misconduct is inadmissible for the

purpose of showing the propensity to commit such crimes." ' " *Id*.

At that point, however, the trial court was well within its discretion to deny a request for a mistrial. No specific crime had been mentioned by Mr. Morton, and the reference to prison was both brief and spontaneous, so the testimony carried little risk of being viewed as propensity evidence by the jury. Moreover, the trial court was in the best position to observe any effect the testimony might have had on the jury, and the trial court offered to instruct the jury to disregard the testimony—an offer that Mr. Brown refused (Tr. 195-196). " 'The fact that a defendant limits his request for relief to that of a mistrial rather than making a request for a less drastic corrective action cannot aid him.' " *See State v. Wright*, 383 S.W.3d 1, 11 (Mo.App. W.D. 2012).

Additionally, rather than exacerbating the problem, Mr. Morton's second reference to prison lessened any prejudice that may have arisen from the first comment. "Erroneously admitted evidence is not considered prejudicial where similar evidence is properly admitted elsewhere in the case or has otherwise come into evidence without objection." *State v. Collis*, 139 S.W.3d 638, 641 (Mo.App. S.D. 2004).

In describing the telephone call that Mr. Brown made to him immediately before Mr. Brown shot Victim, Mr. Morton testified that Mr. Brown said, "You going to keep acting like a little b**ch or are you going to tell me where you at?" (Tr. 198). Mr. Morton said that he laughed at that, and

that Mr. Brown then said, "You know what I got out of prison for, brother, straight up" (Tr. 199).

Unlike the first reference to prison—which was a reference to the historical fact that Mr. Brown had been in prison—this second reference to prison was included in an implicit threat that Mr. Brown made to Mr. Morton immediately prior to the assault (*see* Tr. 198-199). The evidence showed that Mr. Brown was on the telephone with Mr. Morton, and that he was using his impending assault on Victim to terrorize or harm Mr. Morton. Thus, when Mr. Brown said, "You know what I got out of prison for, brother," it was apparent that Mr. Brown was intending to intimidate or scare Mr. Morton, and that Mr. Brown's reference to prison was intended to heighten the threat.

Under those circumstances, Mr. Brown's threat was both logically and legally relevant to prove his guilt. As stated above, evidence of uncharged crimes is generally inadmissible. However, it is well settled that "[e]vidence of prior uncharged misconduct is admissible on a limited basis when it tends to establish motive, intent, the absence of mistake or accident, a common scheme or plan, or the identity of the person charged with the commission of the crime on trial." *State v. Smith*, 353 S.W.3d at 104.

"A related exception is recognized for evidence of uncharged misconduct that is part of the circumstances or the sequence of events surrounding the offense charged, or the 'res gestae.'" *Id.* at 104-105. "This evidence is

admissible to present a complete and coherent picture of the criminal events that transpired." *Id*. at 105. " 'Generally, acts, statements, occurrences, and the circumstances forming part of the main transaction may be shown in evidence under the *res gestae* rule where they precede the offense immediately or by a short interval of time and tend, as background information, to elucidate a main fact in issue.' " *Id*. "The term '*res gestae*' also includes:

> [t]hings done, or ... the facts of the transaction; ... the surrounding facts of a transaction explanatory of an act or showing a motive for acting; ... matters incidental to a main fact and explanatory of it, including acts and words which are so closely connected with a main fact as will constitute a part of it, and without knowledge of which the main fact might not be properly understood.' "

*Id*.

Here, when he made the second reference to prison, Mr. Morton was testifying to statements that Mr. Brown made immediately prior to his shooting the Victim (Tr. 198-199). The evidence showed that Mr. Brown was terrorizing or taunting Mr. Morton with his telephone call by forcing Mr. Morton to listen to or imagine the attack upon Victim. In short, Mr. Brown's statement—"You know what I got out of prison for"—was an implicit threat

that was intended to heighten Mr. Morton's fear. Thus, Mr. Brown's statement was admissible to show a complete and coherent picture, to prove Mr. Brown's intent, and to show motive (*i.e.*, to terrorize or taunt Mr. Morton). *See generally State v. Troupe*, 863 S.W.2d 633, 637 (Mo.App. E.D. 1993) ("Evidence regarding the events during the time victim was kidnapped is not rendered inadmissible merely because it might be viewed as evidence of an uncharged crime.").

In sum, while Mr. Morton's first reference to prison was not proper, the trial court did not abuse its discretion in refusing to declare a mistrial at that time. The trial court offered to instruct the jury to disregard the statement, and there is no reason to believe that the first reference materially affected the outcome of the trial. Moreover, because the second reference to prison was admissible to provide a complete and coherent picture and to prove Mr. Brown's motive and intent, any prejudice from the first reference was eliminated, and a mistrial was not warranted. This point should be denied.

## III.

**The trial court did not abuse its discretion in sustaining the State's objection to defense counsel's offer of proof regarding evidence of Victim's juvenile record and municipal warrants.**

In his third point, Mr. Brown asserts that the trial court abused its discretion in sustaining the State's objection to his offer of proof regarding evidence of Victim's juvenile record and municipal warrants (App.Sub.Br. 34). He asserts that the trial court's ruling improperly limited his ability to cross-examine Victim and show his motive to lie and cooperate with the prosecution (App.Sub.Br. 34).

### A. The standard of review

"A trial court has broad discretion to admit or exclude evidence at trial." *State v. Blurton*, 484 S.W.3d 758, 770 (Mo. 2016). "A trial court's decision regarding the exclusion or admissibility of evidence is reviewed for an abuse of discretion." *Id*. "A trial court abuses its discretion only if its decision to admit or exclude evidence is 'clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.' " *Id*.

"Claims of trial court error are reviewed 'for prejudice, not mere error.' " *Id*. "This Court will reverse the trial court's decision only if there is a

reasonable probability that the error affected the outcome of the trial or deprived the defendant of a fair trial." *Id.*

**B. Victim's juvenile adjudication**

In the offer of proof, Victim stated that, at some point when he was a "child," he admitted that he had been involved in a burglary, and that he acted as lookout for his friends (Tr. 189-190). He testified that he was "on probation for a very long time" (Tr. 189).

Section 211.271.3, RSMo 2000, provides that "all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court, are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceedings, civil or criminal, other than proceedings under this chapter."

"The juvenile protection statute generally ensures against cross-examination on the subject of the juvenile record and impeachment by means of the juvenile record." *State v. Hicklin*, 969 S.W.2d 303, 307 (Mo.App. W.D. 1998). "The statute is 'mandatory' and 'all-inclusive,' and yields only to the extent required by the Sixth Amendment." *Id.*

In support of his claim that he should have been permitted to impeach with the juvenile record, Mr. Brown relies on *Davis v. Alaska*, 415 U.S. 308 (1974), and *State v. Howard*, 693 S.W.2d 888 (Mo.App. W.D. 1985) (App.Br.

32). But both of these cases are readily distinguishable.

In *Davis v. Alaska*, the United States Supreme Court recognized a constitutional exception to the general statutory rule regarding the use of juvenile records. There, the Court held that the Sixth Amendment right to confront a witness requires the admission of juvenile records against the witness only as they pertain to the existence of a possible bias or prejudice of the witness. *See* 415 U.S. at 316-317. Under *Davis*, "[i]mpeachment for bias is permitted where the witness has a motive to lie because he is subject to the control of the juvenile authorities." *State v. Hickin*, 969 S.W.2d at 308.

Here, the offer of proof did not show that Victim was subject to control by juvenile authorities at the time of the crime or at the time or trial. There was no evidence that he was still on probation at any relevant time or that he had any pending juvenile cases. Thus, there was nothing in the record to suggest that his prior juvenile case had any bearing on his credibility in this case. *Cf. Davis*, 415 U.S. at 313-314, 318 (the witness was on probation under a juvenile court adjudication); *State v. Howard*, 693 S.W.2d at 888-889, 891 (the witness was in a juvenile detention facility when he witnessed the crime). The trial court did not abuse its discretion in excluding this evidence.

**C. Victim's outstanding warrants**

In the offer of proof, Victim stated that he had "warrants out" of Ferguson and Florissant (Tr. 185). He said that one of them arose out of an

incident "when [he] was younger" and he "dragged a cooler out of Wal-Mart" (Tr. 185). He said he got in trouble for stealing and drinking because he was "under age" (Tr. 185). He said that the other warrant also arose out of an incident of stealing when he was "in the wrong place at the wrong time" (Tr. 186). He said he "got locked up for it" (Tr. 186).

When asked if he thought he could be arrested on those warrants by the prosecutor, Victim said, "I believe any officer has authority to arrest me on those warrants" (Tr. 187). When asked about the prosecutor's "relation with the warrants," Victim said, "I don't think we have a relationship with the warrants" (Tr. 187). He said that he told the police about his warrants on the day he was shot (Tr. 188). He stated that he had told the prosecutor about the warrants, and that he had "had these warrants for a long time" (Tr. 188). When asked if the prosecutor ever told him that she did not care about the warrants, Victim said, "She never said she didn't care, but it was like I'm not going to lock you up. You're here to testify" (Tr. 188).

On cross-examination, Victim stated that the warrants were from cases that had already been resolved (Tr. 190). He stated that he was supposed to pay fines, and that if he did not pay, he got warrants (Tr. 190-191). He stated that the warrants were "for failure to appear or something like that," *e.g.*, failing to "keep up on [his] payments" (Tr. 191). He stated that the cases arose out of municipal ordinance violations (Tr. 191).

Unlike the cases cited by Mr. Brown (App.Br. 31-32), Victim did not have pending charges that bore upon his credibility in this case. *Cf. State v. Thomas*, 118 S.W.3d 686, 689-690 (Mo.App. W.D. 2003); *State v. Joiner*, 823 S.W.2d 50, 53 (Mo.App. E.D. 1991). To the contrary, the record shows that Victim's municipal cases had both been resolved at some point before trial, and he had already been ordered to pay fines for violating the municipal ordinances in question.

There was no evidence that the prosecutor did anything or promised anything in relation to those previously-resolved cases, and there was no evidence that Victim expected any sort of favorable treatment in his old municipal cases based on his cooperation in this case. *See generally State v. Moore*, 252 S.W.3d 272, 276-277 (Mo.App. S.D. 2008) ("Faced with no evidence of [the witness's] perception of either favorable treatment if he testified favorably to the State or harsh treatment if he testified unfavorably, the trial court was acting within its discretion and committed no error when it . . . ruled that evidence of the unrelated pending charges against [the witness] was inadmissible."); *State v. Fry*, 197 S.W.3d 211, 216-217 (Mo.App. S.D. 2006) (" '[s]peculating or theorizing motives for testifying is not sufficient to show the connection that is necessary to obviate the trial court's discretion.' "). *See also State v. Keenan*, 779 S.W.2d 743, 746 (Mo.App. S.D. 1989) ("Violations of municipal ordinances do not constitute criminal offenses

for the purpose of impeachment."). The trial court did not abuse its discretion in excluding this evidence. This point should be denied.

## CONCLUSION

The Court should affirm Mr. Brown's convictions and sentences.

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 8,757 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 23rd day of September, 2016, to:

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