IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC95461
	)	
JAMES C. SMITH,	)	
	)	
Appellant.	)	

APPEAL TO THE
MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF PETTIS COUNTY, MISSOURI
18th JUDICIAL CIRCUIT
THE HONORABLE ROBERT L. KOFFMAN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Following a jury trial in Pettis County, Appellant, James Smith, was convicted of the following crimes: one count of first degree burglary (Count 1), §569.160; four counts of second degree burglary (Counts 3, 5, 6, 9), §569.170; four counts of felony stealing (Counts 2, 4, 7, 10), §570.030; one count of resisting arrest (Count 11), §575.150; and one count of second degree property damage (Count 8), §569.120.

Mr. Smith was sentenced to the following terms of imprisonment: ten years for Count I; seven years each for Counts 2, 3, 4, 5, 6, 7, 9 and 10; and four years for Count 11. He was also sentenced to thirty days in jail for Count 8. The sentences in Counts 2-11 were ordered to run concurrently with each other, but consecutively to Count 1.

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Western District. Article V, section 3, Mo. Const.; section 477.070. This Court thereafter granted the State's application for transfer, so this Court has jurisdiction. Article V, sections 3 and 10, Mo. Const. and Rule 83.04.

STATEMENT OF FACTS

The State charged James Smith, Appellant, with eleven crimes, arising out of six separate incidents in Sedalia, Missouri (LF 21-24). These incidents are described below:

Cole's Cutting Edge Lawn Care incident – April, 2012

On April 11, 2012, two Sedalia police officers reported to Cole's Cutting Edge Lawn Care business for a report of a break-in (TR 199, 206). There was damage to some storage shed doors, three new string trimmers and three leaf blowers were missing from an enclosed trailer, and items had been scattered throughout the interior of the business (TR 187-188, 200, 206). A computer and tablet, less than six months old, were missing from the office (TR 187-188; Ex. 73).

The officers walked the perimeter of the property line fence looking for an access point (TR 201). On the north side of the property, there was an area where the grass had been compressed and a portion of the corrugated metal fence had been pulled away from the frame (TR 201, 207). The owner verified that this opening in the fence had not been there previously (TR 189). A bicycle that had been inside the business was recovered outside of the fence; it looked like it had been thrown over the fence, as it was bent up (TR 187-190).

At that same location near the fence, they found a cigarette butt lying on top of the grass (TR 203-204). DNA developed from this cigarette butt matched the DNA profile from Mr. Smith (TR 172-176, 209).

Robert Cashman incident - April, 2012

Robert Cashman stores his forty-foot pull-behind camper on the property of Cole's Cutting Edge Lawn Care (TR 192-194). The camper was capable of sleeping eight people; it had two bedrooms, a kitchen, and a living/dining room area (TR 194). Cashman was advised that his camper had been broken into during the break-in at the business; when he checked on it, he found that the glass in the front door had been broken (TR 195). A television from the kitchen and a semi-automatic handgun, stored in the master bedroom dresser drawer, were missing from the camper (TR 195-196).

Sedalia Post Office – August, 2012

An alarm sounded at the Sedalia Post Office at 3:25 a.m. on August 7, 2012 (TR 225). Two officers arrived immediately; they checked the front doors and windows and the lobby, but everything was secure (TR 225-226). However, they did not check the east side of the post office (TR 226).

Two post office employees arrived for work approximately 20 minutes later (TR 217). They found broken glass and two broken windows on the east side of the building; they called the police and waited outside (TR 217-218, 227). When police arrived, they walked through the building with the employees; although things had been "messed up," there was nothing missing and they could not identify anything that had been stolen (TR 219-221, 224).

A window had been broken with a brick, and the screen had been removed (TR 228). On the broken window, there was a very small dot of blood, and on another

window, there was a blood smear (TR 228). This blood was seized, and DNA developed from the blood samples matched Mr. Smith's DNA profile (TR 177-179).

Sedalia Tool and Manufacturing – September, 2012

On September 27, 2012, an employee of Sedalia Tool and Manufacturing arrived for work and saw that the front door glass had been broken out (TR 240). Video cameras on the outside of the business recorded activity between 12:22-12:30 a.m., although no one could be identified from the video (TR 254-257).

A piece of steel had been thrown through the window of the front door (TR 240). A desk drawer in the reception area had been pried open, and there was damage to one of the vending machines (TR 238, 240). Someone had tried to pry the machine open and the bill changer had been ripped out (TR 238). The door to another office had been busted open; the door lock was in pieces and the doorjamb was ripped apart (TR 241). The damage to both doors amounted to $350 (TR 242-243, 264).

Two computers were missing from an office desk (TR 241). One laptop was worth $1,200 and the other laptop had a SURFCAM access key on the back of it (TR 243, 264). The SURFCAM key is programming software that is essential to the business and it was valued at $14,000 (TR 244).

An email from the previous day – dated September 26 – was found lying on top of an office desk and it had a smudge of blood on it (TR 241, 258-259, 269; Ex. 34). This blood was seized and tested; the DNA profile developed from the blood matched Mr. Smith's DNA profile (TR 179-183).

Officer Jill Green questioned Mr. Smith after he had been taken into custody (TR 272). She advised him of the Miranda warnings and began to question him about the break-in at Sedalia Tool & Manufacturing (TR 274). Mr. Smith told Officer Green that he did not know anything about it, he did not know where it was, and that he was done talking to her (TR 275).

Cranker & Sons – March 4, 2013

In December, 2012, someone knocked a door out of the wall on the west side of the building that houses Cranker & Sons shop[1] (TR 276). During this break-in, a key for the front door was stolen, along with $150 and a bottle of whiskey (TR 277). The intruder had left 2-3 shoeprints on the door (TR 279; Ex. 63-64). After this first break-in, Mr. Crank reconstructed the entire front wall of the building, and closed off one of the doors (TR 278; Ex. 59-62). He also changed the locks and door knobs and installed a security camera (TR 280).

In March, 2013, another break-in occurred at the shop; the intruder tried the key that had been taken during the first break-in and bent it (TR 280). The bent door key was left on a table in the shop (TR 286; Ex. 71). The person then tried to kick in the front door (TR 280). Finally, the person gained access by climbing a snow pile and kicking in a window (TR 281). The security camera captured images of the person's face (TR 283-286; Ex. 72A-I).

[1] Douglas Crank uses this shop to work on recreational vehicles (TR 276).

During this second entry, Mr. Crank's computer equipment was taken and a collectible toy (TR 281-282; Ex. 74).

When a search warrant was later executed at Mr. Smith's residence, shoes that matched a shoeprint left during the first break-in were found inside Mr. Smith's residence (TR 279, 298, 301; Ex. 63-64, 69-70).

Mr. Smith's arrest – March 20, 2013

Officer Joshua Howell had had contact with Mr. Smith before when he was in his police uniform (TR 303). On the morning of March 20, 2013, Officer Howell was not in uniform, but was wearing a shirt and pants, with a badge on his belt (TR 304). He was wearing a side arm, handcuffs and a magazine (TR 304). On this day, Howell believed he had probable cause to arrest Mr. Smith and he was looking for him (TR 303, 307).

Officer Howell saw Mr. Smith walking westbound on the north sidewalk of Saline Street (TR 304). Howell pulled over to the side, got out of his unmarked car, and motioned for Mr. Smith to walk towards him (TR 305, 312). Howell also addressed Mr. Smith verbally and Mr. Smith was looking at him (TR 306). When they were almost face to face, Howell asked Mr. Smith to remove his hands from his jacket and Mr. Smith complied (TR 307).

Officer Howell asked Mr. Smith to place his hands behind his back because he was under arrest (TR 307). Mr. Smith began to back up and asked what this was about (TR 307). Howell said that he would explain that, but that he needed Mr. Smith to place his hands behind his back (TR 307). Mr. Smith did not do so, and Howell grabbed one of Mr. Smith's arms; Mr. Smith curled his arm up and continued backing away (TR 307-

308, 313). Howell forced Mr. Smith to the ground, where he placed him in handcuffs (TR 308).

The defense presented no evidence (TR 320). Defense counsel requested lesser-included offense instructions for first degree trespass on each of the burglary counts – Counts 1, 3, 6 and 9; this request was refused (TR 320-331; LF 65, 66, 68).[2] Defense counsel also requested lesser-included offense instructions for misdemeanor stealing on Counts 4 and 7 (TR 328-331; LF 67, 69). Related to these counts, defense counsel argued that the jury should be allowed to believe or disbelieve some, all or none of the evidence, that trespass should always be a lesser included charge of burglary, and misdemeanor stealing should always be a lesser option of felony stealing (TR 328-331). The trial court refused all six proposed lesser-included instructions (TR 331; LF 65-69; Supp. LF 1). The trial court did give a lesser-included instruction for Burglary in the second degree, as to Count I (TR 327-328; LF 40).

The jury found Mr. Smith guilty on all eleven counts (TR 375-377; LF 65-80). The trial court sentenced Mr. Smith, as a persistent offender, to: ten years imprisonment on Count 1; seven years on Counts 2, 3, 4, 5, 6, 7, 9 and 10; four years on Count 11; and 30 days in jail on Count 8 (TR 16, 388, 398; LF 83-88). Counts 2-11 were ordered to run concurrently to each other, but consecutively to Count 1 (LF 83-88; TR 388). After a timely notice of appeal was filed, this appeal follows (LF 89-91).

[2] Defense counsel included the failure to give lesser-included instructions on these six counts in Mr. Smith's motion for new trial (LF 82), which was overruled.

INTRODUCTION

In this appeal, Mr. Smith challenges the trial court's refusal to submit six nested lesser-included offense instructions to his jury: four instructions for trespass in the first degree as a lesser-included offense of burglary in the first and second degrees (Points 1, 2 4 and 6); and two instructions for misdemeanor stealing as a lesser-included offense of felony stealing (Points 3 and 5). Each point raised in this appeal is based upon the precedent of ***State v. Jackson***, 433 S.W.3d 390 (Mo. banc 2014) and ***State v. Pierce***, 433 S.W.3d 424 (Mo. banc 2014). Undersigned counsel did not want to violate the briefing rules by combining these points, but did want to warn the Court in advance about the repetitive nature of the points raised herein.

POINTS RELIED ON

I.

The trial court erred in refusing to instruct the jury on trespass in the first degree as to Count 1, because that offense is a lesser included offense of burglary in the first degree and the submitted lesser included offense of burglary in the second degree, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offenses and a conviction only on the lesser, since the question of Mr. Smith's intent was for the jury to decide, and the jury could have found that Mr. Smith knowingly entered the premises unlawfully, but not for the purpose of committing stealing therein, and the submission of burglary in the first and second degrees did not test this intent element.

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

State v. Blewett, 853 S.W.2d 455 (Mo. App. W.D. 1993);

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

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a);

Section 556.046; and

Rules 28.03 & 29.11.

II.

The trial court erred in refusing to instruct the jury on the offense of trespass in the first degree as to Count 3, because that offense is a lesser included offense of burglary in the second degree, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser, since the question of Mr. Smith's intent was for the jury to decide, and the jury could have found that Mr. Smith knowingly entered the premises unlawfully, but not for the purpose of committing stealing therein.

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

State v. Blewett, 853 S.W.2d 455 (Mo. App. W.D. 1993);

U.S. Const., Amends 6 & 14;

Mo. Const. Art. I, Sections 10 & 18(a);

Section 556.046; and

Rules 28.03 & 29.11.

III.

The trial court erred in refusing to instruct the jury on misdemeanor stealing as to Count 4, because that offense is a lesser included offense of felony stealing, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser, since the question of value was for the jury to decide, and the jury could have found that the value of the stolen items was less than $500.

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

State v. Pierce, 433 S.W.3d 424 (Mo. banc 2014);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a);

Section 556.046; and

Rules 28.03 & 29.11.

IV.

The trial court erred in refusing to instruct the jury on the offense of trespass in the first degree as to Count 6, because that offense is a lesser included offense of burglary in the second degree, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser, since the question of Mr. Smith's intent was for the jury to decide, and the jury could have found that Mr. Smith knowingly entered the premises unlawfully, but not for the purpose of committing stealing therein.

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

State v. Blewett, 853 S.W.2d 455 (Mo. App. W.D. 1993);

U.S. Const., Amends 6 & 14;

Mo. Const. Art. I, Sections 10 & 18(a);

Section 556.046; and

Rules 28.03 & 29.11.

V.

The trial court erred in refusing to instruct the jury on misdemeanor stealing as to Count 7, because that offense is a lesser included offense of felony stealing, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser, since the question of value was for the jury to decide, and the jury could have found that the value of the stolen items was less than $500.

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

State v. Pierce, 433 S.W.3d 424 (Mo. banc 2014);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a);

Section 556.046; and

Rules 28.03 & 29.11.

VI.

The trial court erred in refusing to instruct the jury on the offense of trespass in the first degree as to Count 9, because that offense is a lesser included offense of burglary in the second degree, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser, since the question of Mr. Smith's intent was for the jury to decide, and the jury could have found that Mr. Smith knowingly entered the premises unlawfully, but not for the purpose of committing stealing therein.

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

State v. Blewett, 853 S.W.2d 455 (Mo. App. W.D. 1993);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a);

Section 556.046; and

Rules 28.03 & 29.11.

VII.[3]

The trial court plainly erred in proceeding to trial, accepting the jury's verdict and imposing sentence on Count V, Burglary in the Second Degree, because these actions violated Mr. Smith's right to due process of law in that the crime was alleged to have occurred at the United States Post Office in Sedalia, Missouri, a federal enclave over which federal courts have exclusive jurisdiction under Article I, section 8, clause 17 of the United States Constitution and Sections 12.010 and 12.020, RSMo, and the trial court lacked subject matter jurisdiction to proceed on Count V.

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (2009);

State ex rel. Laughlin v. Bowersox, 318 S.W.3d 695 (Mo. banc 2010);

U.S. Const., Art. I, Section 8, clause 17;

Sections 12.010 & *12.020*; and Rule 30.20.

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[3] This issue was not briefed in the Court of Appeals, Western District, except through a letter brief prior to oral argument. The issue was also discussed at oral argument and tangentially addressed in the Western District's opinion. Mr. Smith briefs this issue in this Court because it involves the trial court's lack of subject matter jurisdiction over Count five, which he asserts may be raised at any time. ***State ex rel. Laughlin v. Bowersox***, 318 S.W.3d 695, 703 (Mo. 2010) (If a criminal judgment was entered by a court without jurisdiction to do so, such a proceeding always should be found to be void, whether determined on direct appeal or in a habeas proceeding.) However, if this Court believes briefing of this issue for the first time in this Court violates ***Rule 83.08(b)***, then he asks that the Court strike only this claim from its consideration.

ARGUMENTS

I.

The trial court erred in refusing to instruct the jury on trespass in the first degree as to Count 1, because that offense is a lesser included offense of burglary in the first degree and the submitted lesser included offense of burglary in the second degree, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offenses and a conviction only on the lesser, since the question of Mr. Smith's intent was for the jury to decide, and the jury could have found that Mr. Smith knowingly entered the premises unlawfully, but not for the purpose of committing stealing therein, and the submission of burglary in the first and second degrees did not test this intent element.

Standard of Review

This Court's review of the circuit court's decision to give or refuse a requested jury 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.* (footnote omitted).

Facts and Preservation

Robert Cashman's pull-behind camper, which he stores on the property of Cole's Cutting Edge Lawn Care business, was broken into on the same night as the business (TR 192-195). The glass in the front door of the camper had been broken (TR 195). A television from the kitchen area and a semi-automatic handgun that Cashman kept in the master bedroom dresser drawer were missing from the camper (TR 195-196).

Mr. Smith was developed as a suspect in these break-ins based on the DNA found on a fresh cigarette butt located near the gap in the fence surrounding the property (TR 172-175, 202-204, 208). The State charged Mr. Smith with burglary in the first degree of Robert Cashman's trailer, alleging that Mr. Smith "knowingly entered unlawfully in [Cashman's trailer], for the purpose of committing stealing therein, and while in such inhabitable structure and while in immediate flight from such inhabitable structure, [Mr. Smith] was armed with a deadly weapon." (LF 21).

As to Count 1, the jury was instructed on the offense of burglary in the first degree (LF 38). As to this Count, defense counsel had also requested that the jury be instructed on the lesser-included offenses of burglary in the second degree and first degree trespass (TR 328-331). Defense counsel argued that the jury should be allowed to believe or disbelieve some, all or none of the evidence, and that trespass should always be a lesser included charge of burglary (TR 328-331). The trial court submitted the requested lesser instruction for burglary in the second degree (LF 40), but refused to submit the requested lesser instruction for trespass in the first degree (LF 65). The refused instruction read:

INSTRUCTION NO. ____

As to Count 1, if you do not find the defendant guilty of burglary in the second degree as submitted in Instruction No. ___, you must consider whether he is guilty of trespass in the first degree under this instruction.

As to Count 1, if you find and believe from the evidence beyond a reasonable doubt:

That on or about April 10, 2012, in the County of Pettis, State of Missouri, the defendant knowingly entered unlawfully in an inhabitable structure located at 208 N. Mill, Sedalia, Missouri, and owned by Robert Cashman,

then you will find the defendant guilty under Count 1 of trespass 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.

MAI-CR3d 323.56
Submitted by Defendant
(LF 65; Appendix A1)

The jury found Mr. Smith guilty of burglary in the first degree (TR 375; LF 65). Defense counsel included the failure to give this lesser-included instruction in Mr. Smith's motion for new trial (LF 82), which was overruled. Therefore, this issue is preserved for appellate review. ***Rules 28.03*** and ***29.11(d)***.

Legal Analysis

"It is impossible to commit burglary in the second degree without committing trespass in the first degree." ***State v. Blewett***, 853 S.W.2d 455, 459 (Mo. App. W.D.

1993) (quoting ***State v. Neighbors***, 613 S.W.2d 143, 147 (Mo. App. W.D. 1980). "Thus, there is no escape from the conclusion that trespass in the first degree is a lesser included offense of the greater offense of burglary in the second degree." *Id.* The question is one of the defendant's intent." *Id.*

The trial court erred in failing to instruct Mr. Smith's jury on trespass in the first degree because it is impossible to commit burglary without committing trespass, and it was solely within the province of the jury to determine whether Mr. Smith knowingly entered the premises unlawfully *for the purpose of stealing* (burglary), or whether he only knowingly entered unlawfully, period (trespass). The submission of the lesser-included instruction of burglary in the second degree did not test whether the jury might have found that Mr. Smith did not enter with *any* intent to steal. *See* ***State v. Nutt***, 432 S.W.3d 221, 225 (Mo. App. W.D. 2014); ***State v. Frost***, 49 S.W.3d 212, 220 (Mo. App. W.D. 2001). The trial court should have submitted trespass in the first degree, in addition to burglary in the second degree, as a lesser-included offense of burglary in the first degree.

Under ***Section 556.046***, the circuit court is required to give an instruction on a lesser included offense when each of these requirements is met: "a. a party requests the instruction; b. there is a basis in the evidence for acquitting the defendant of the charged offense; and c. there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested." ***Jackson***, 433 S.W.3d at 396 (footnote omitted). " 'Doubts concerning whether to instruct on a lesser included offense should be resolved in favor of including the instruction, leaving it to the jury to decide.' "

State v. Williams, 313 S.W.3d 656, 660 (Mo. banc 2010) (quoting ***State v. Derenzy***, 89 S.W.3d 472, 474–75 (Mo. banc 2002)).

Here, Mr. Smith timely requested the trespass in the first degree instruction (TR 328-331; LF 65). It is also clear that there was a basis to acquit Mr. Smith of both burglary in the first degree and burglary in the second degree. The jury did not have to believe that Mr. Smith knowingly entered unlawfully *for the purpose of committing the crime of stealing therein*. The jury could have believed that Mr. Smith only knowingly entered unlawfully.

In discussing this requirement in ***Jackson***, 433 S.W.3d at 399, this Court found that there is a basis to acquit the defendant of the greater offense in virtually every case. This is because "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 [between the greater and lesser offenses]." *Id.* This Court further explained that the jury's right to disbelieve all or any part of the evidence and to refuse to draw inferences constitutes a sufficient basis for acquittal regardless of the strength of the State's case:

> No matter how strong, airtight, inescapable, or even absolutely certain the evidence and inferences in support of the differential element may seem to judges and lawyers, no evidence *ever* proves an element of a criminal case until all 12 jurors believe it, and no inference *ever* is drawn in a criminal case until all 12 jurors draw it.

Id. at 400. Accordingly, there was a basis to acquit Mr. Smith of burglary in the first and second degrees because the jury did not have to believe that he knowingly entered unlawfully *for the purpose of stealing*. The only instruction that would have presented that theory of defense was the trespass in the first degree instruction.

In ***Jackson***, the defendant was charged with first-degree robbery, which required the jury to find that he took the victim's property by force and that the victim reasonably believed that he was using or threatening to use a weapon. *Id.* 433 S.W.3d at 394. The circuit court refused the defendant's request to instruct the jury on the lesser included offense of second-degree robbery, which required the jury to find only that he took the victim's property by force. *Id.*

On appeal, this Court reversed, finding that all three requirements for instructing on the lesser included offense had been met. *Id.* at 396–409. In discussing the third requirement—whether there was a basis for convicting the defendant of the lesser offense—the Court noted that first-degree and second-degree robbery require proof of the same elements, that is, proof of whether the defendant took the victim's property by force. *Id.* at 404. The only differential element between the two offenses is whether the victim reasonably believed that the defendant was using or threatening to use a weapon, which is a required element of only first-degree robbery. *Id.* Hence, the Court found that second-degree robbery is a "nested" lesser included offense of first-degree robbery, because it is comprised of a subset of the elements of first-degree robbery. *Id.*

This Court explained that, where nested lesser included offenses are involved, "'it is *impossible to commit* the greater without *necessarily committing* the lesser.' " *Id.*

(citation omitted). This is because "[a]ny evidence that is sufficient to prove the elements of the charged offense must necessarily be sufficient to prove a crime that is comprised of a subset of those same elements, i.e., a 'nested' lesser offense." *Id.* at 405. Therefore, because there was sufficient evidence in ***Jackson*** from which the jury could find that the defendant committed first-degree robbery by taking the victim's property by force *and* using or threatening to use a gun, the evidence was necessarily sufficient to prove that the defendant committed second-degree robbery by simply taking the victim's property by force without using or threatening to use a gun. *Id.*

This Court noted that this reasoning also applied to require the court to give the requested instruction for the nested lesser included offense in *Jackson's* companion case, ***State v. Pierce***, 433 S.W.3d 424 (Mo. banc 2014). ***Jackson***, 433 S.W.3d at 405. Because the evidence in ***Pierce*** was sufficient to prove that the defendant, who was found in possession of cocaine base, committed second-degree trafficking in that the controlled substance weighed two or more grams, the evidence had to be sufficient to prove the nested lesser included offense of possession, which includes all of the elements of second-degree trafficking except evidence of the controlled substance's weight. *Id.* (citing ***Pierce***, 433 S.W.3d at 432).

In the Court of Appeals, Respondent conceded that the trial court erred in failing to instruct the jury on the nested lesser-included offense of trespass in the first degree (Resp. Br. 10-12). However, Respondent claimed that this error was not prejudicial for two reasons: 1) the nested lesser-included offense of burglary in the second degree was

also given and the jury did not choose that option; and 2) the jury found Mr. Smith guilty of stealing (Resp. Br. at 12). Respondent's reasoning is incorrect.

First, instructing the jury on burglary in the second degree as a nested lesser-included offense of burglary in the first degree did not test whether the jury might have found that Mr. Smith did not enter with *any* intent to steal. *See* ***State v. Nutt****, supra,* and ***State v. Frost****, supra*. The only way to test that intent was to submit the requested trespass in the first degree instruction, in addition to burglary in the second degree. The fact that the jury did not come back with burglary in the second degree does not establish that the jury evaluated or was able to test Mr. Smith's intent *upon entry*. Indeed, the only reason that this charge was elevated to first degree burglary is because Mr. Smith allegedly found a gun inside the trailer and took it, so he was "armed with a deadly weapon" when he exited the trailer. Again, the jury should still have been able to evaluate Mr. Smith's intent *upon entry*. The only instruction that would do so is the trespass first instruction.

Second, the fact that the jury found Mr. Smith guilty of the accompanying stealing count is of no import on the analysis as to whether a trespass instruction was required. Respondent ignores the relevant reasoning from ***State v. Jackson***, 433 S.W.3d 390 (Mo. 2014). In ***Jackson***, the defendant was charged not only with robbery in the first degree, but also armed criminal action. The differentiating factor between robbery in the first degree and robbery in the second degree was that in the course of taking the property, the defendant displayed or threatened the use of what appeared to be a deadly weapon or dangerous instrument. *Id.* at 394. The State had argued that there was no prejudice from

failure to instruct on robbery in the second degree because the jury had found the defendant guilty of armed criminal action – in other words, it had found that the object the defendant displayed *was* a weapon. This Court noted:

> Jackson also was charged and found guilty of armed criminal action. The instruction for this count stated that the jury could convict him of armed criminal action only if it found beyond a reasonable doubt that Jackson committed robbery in the first degree and that he "committed that offense by or with or through the use or assistance or aid of a deadly weapon." Based on the jury's verdicts, therefore, the jury not only found beyond a reasonable doubt that the object in Jackson's hand reasonably ***appeared*** to the employee to be a gun, the jury found beyond a reasonable doubt that the object in Jackson's hand ***was*** a gun.

Id. at 394, n. 2 (emphasis in original).

Nevertheless, in addressing whether Jackson suffered from any prejudice from the court's failure to instruct on robbery in the second degree, this Court explained:

> Here, any such prejudice from the refusal to instruct the jury on second-degree robbery seems logically inconsistent with the fact, discussed above, that the jury found both that the object in Jackson's hand reasonably appeared to be a gun and that he actually used a gun. The Court need not reconcile these, however, because prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence. ***State v. Redmond***, 937 S.W.2d 205, 210 (Mo. banc 1996) (defendant "is entitled to a new trial before a properly instructed jury").

Id. at 395, n. 4.

Here, the fact that Mr. Smith's jury found him guilty of stealing has much less of an effect on the prejudice analysis than Jackson's jury finding him guilty of armed criminal action. This is because a conviction of stealing does not inform whether Mr. Smith had the intent to steal *when he entered* the property – which is what distinguishes trespass from burglary. Just like ***Jackson*** – and, arguably, even more so – prejudice is presumed here. No matter how compelling the evidence may be, it is for the jury—and only the jury—to decide whether the state proved that element beyond a reasonable doubt. *Id.* at 400, n.11.

Because trespass in the first degree is a nested lesser offense of burglary in the first degree, Mr. Smith was entitled to the instruction upon request, and this Court must reverse for a new trial on Count I.

II.

The trial court erred in refusing to instruct the jury on the offense of trespass in the first degree as to Count 3, because that offense is a lesser included offense of burglary in the second degree, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser, since the question of Mr. Smith's intent was for the jury to decide, and the jury could have found that Mr. Smith knowingly entered the premises unlawfully, but not for the purpose of committing stealing therein.

Standard of Review

This Court's review of the circuit court's decision to give or refuse a requested jury 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.* (footnote omitted).

Facts and Preservation

On April 11, 2012, two Sedalia police officers reported to Cole's Cutting Edge Lawn Care business for a report of a break-in (TR 199, 206). There was damage to some storage shed doors, three new string trimmers and three leaf blowers were missing from an enclosed trailer, and items had been scattered throughout the interior of the business

(TR 187-188, 200, 206). A computer and tablet, less than six months old, were missing from the office (TR 187-188; Ex. 73).

The officers walked the perimeter of the property line fence looking for an access point (TR 201). On the north side of the property, there was an area where the grass had been compressed and a portion of the corrugated metal fence had been pulled away from the frame (TR 201, 207). The owner verified that this opening in the fence had not been there previously (TR 189). A bicycle that had been inside the business was found outside of the fence; it looked like it had been thrown over the fence, as it was bent up (TR 187-190). At that same location near the fence, they found a cigarette butt lying on top of the grass (TR 203-204). A DNA profile developed from this cigarette butt matched the DNA profile from Mr. Smith (TR 172-176, 209).

The State charged Mr. Smith, in Count 3, with burglary in the second degree, alleging that Mr. Smith "knowingly entered unlawfully in [Cole's Cutting Edge Lawn Service], for the purpose of committing stealing therein." (LF 22).

As to Count 3, the jury was instructed on the offense of burglary in the second degree (LF 44). As to this Count, defense counsel had also requested that the jury be instructed on the lesser-included offense of first degree trespass (TR 328-331; LF 66). Defense counsel argued that the jury should be allowed to believe or disbelieve some, all or none of the evidence, and that trespass should always be a lesser included charge of burglary (TR 328-331). The trial court refused to submit the requested instruction for trespass in the first degree (LF 66). The refused instruction read:

INSTRUCTION NO. ____

As to Count 3, if you do not find the defendant guilty of burglary in the second degree as submitted in Instruction No. ___, you must consider whether he is guilty of trespass in the first degree under this instruction.

As to Count 3, if you find and believe from the evidence beyond a reasonable doubt:

That on or about April 10, 2012, in the County of Pettis, State of Missouri, the defendant knowingly entered unlawfully in an inhabitable structure located at 208 N. Mill, Sedalia, Missouri, and owned by Cole Watring,

then you will find the defendant guilty under Count 3 of trespass 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.

MAI-CR3d 323.56
Submitted by Defendant
(LF 66; Appendix A2)

The jury found Mr. Smith guilty of burglary in the second degree as to Count 3 (TR 375; LF 72). Defense counsel included the failure to give this lesser-included instruction in Mr. Smith's motion for new trial (LF 82), which was overruled. Therefore, this issue is preserved for appellate review. ***Rules 28.03*** and ***29.11(d)***.

Legal Analysis

As fully discussed in Point I, "it is impossible to commit burglary in the second degree without committing trespass in the first degree." ***State v. Blewett***, 853 S.W.2d 455, 459 (Mo. App. W.D. 1993) (quoting ***State v. Neighbors***, 613 S.W.2d 143, 147 (Mo.

App. W.D. 1980). "Thus, there is no escape from the conclusion that trespass in the first degree is a lesser included offense of the greater offense of burglary in the second degree." *Id.*

The trial court erred in failing to instruct Mr. Smith's jury on trespass in the first degree, as a nested lesser offense of burglary in the second degree under Count 3, because it was solely within the province of the jury to determine whether Mr. Smith knowingly entered the premises unlawfully *for the purpose of stealing* (burglary), or whether he only knowingly entered unlawfully, period (trespass).

Under ***Section 556.046***, the circuit court is required to give an instruction on a lesser included offense when each of these requirements is met: "a. a party requests the instruction; b. there is a basis in the evidence for acquitting the defendant of the charged offense; and c. there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested." ***Jackson***, 433 S.W.3d at 396 (footnote omitted). " 'Doubts concerning whether to instruct on a lesser included offense should be resolved in favor of including the instruction, leaving it to the jury to decide.' " ***State v. Williams***, 313 S.W.3d 656, 660 (Mo. banc 2010) (quoting ***State v. Derenzy***, 89 S.W.3d 472, 474–75 (Mo. banc 2002)).

Here, Mr. Smith timely requested the trespass in the first degree instruction (TR 328-331; LF 65). It is also clear that there was a basis to acquit Mr. Smith of both burglary in the first degree and burglary in the second degree. The jury did not have to believe that Mr. Smith knowingly entered unlawfully *for the purpose of committing the crime of stealing therein*. The jury could have believed that Mr. Smith only knowingly

entered unlawfully. And "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 [between the greater and lesser offenses]." ***Jackson***, 433 S.W.3d at 399.

> No matter how strong, airtight, inescapable, or even absolutely certain the evidence and inferences in support of the differential element may seem to judges and lawyers, no evidence *ever* proves an element of a criminal case until all 12 jurors believe it, and no inference *ever* is drawn in a criminal case until all 12 jurors draw it.

Id. at 400. Accordingly, there was a basis to acquit Mr. Smith of burglary in the second degree because the jury did not have to believe that he knowingly entered unlawfully *for the purpose of stealing*.

Because trespass in the first degree is a nested lesser offense of burglary in the second degree, Mr. Smith was entitled to the instruction upon request, and this Court must reverse for a new trial.

III.

The trial court erred in refusing to instruct the jury on misdemeanor stealing as to Count 4, because that offense is a lesser included offense of felony stealing, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser, since the question of value was for the jury to decide, and the jury could have found that the value of the stolen items was less than $500.

Standard of Review

This Court's review of the circuit court's decision to give or refuse a requested jury 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.* (footnote omitted).

Facts and Preservation

Cole Watring testified that three new string trimmers and three leaf blowers in excellent condition were missing from his business (TR 187-188). He also testified that a computer and tablet, less than six months old, were missing from the office (TR 187-188). Exhibit 73 reflected the fair market value of the items (TR 189; Ex. 73).

The State charged Mr. Smith, in Count 4, with Class C felony stealing, alleging

that he "appropriated [the missing items], property having a total value of at least five hundred dollars, …without the consent of [the owners] and with the purpose to deprive them thereof." (LF 22).

As to Count 4, the jury was instructed on the offense of felony stealing (LF 46). As to this Count, defense counsel also requested that the jury be instructed on the lesser-included offense of misdemeanor stealing (TR 328-331; LF 67). Defense counsel argued that the jury should be allowed to believe or disbelieve some, all or none of the evidence, and that misdemeanor stealing should always be a lesser option for felony stealing (TR 328-331). The trial court refused to submit the requested instruction for misdemeanor stealing (LF 67). The refused instruction read:

INSTRUCTION NO. ____

As to Count 4, if you do not find the defendant guilty of stealing as submitted in Instruction No. ___, you must consider whether he is guilty of stealing under this instruction.

As to Count 4, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about April 10, 2012, in the County of Pettis, State of Missouri, the defendant took three string trimmers, three blowers, a laptop computer, and a tablet device, property owned by Cole Watring, doing business as Cole's Cutting Edge Lawn Service, and

Second, that defendant did so without the consent of Cole Watring, and

Third, that defendant did so for the purpose of withholding it from the owner

permanently,

then you will find the defendant guilty under Count 4 of stealing 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.

MAI-CR3d 324.02.1
Submitted by Defendant

(LF 67; Appendix A3)

The jury found Mr. Smith guilty of felony stealing as to Count 4 (TR 376; LF 73). Defense counsel included the failure to give this lesser-included instruction in Mr. Smith's motion for new trial (LF 82), which was overruled. Therefore, this issue is preserved for appellate review. ***Rules 28.03*** and ***29.11(d)***.

Legal Analysis

Under Section **570.030**,[4] stealing is a Class A misdemeanor, unless, as charged in Mr. Smith's case, the value of the property appropriated is five hundred dollars or more but less than twenty-five thousand dollars. Then, it is a Class C felony. The only difference in the two crimes in the value of the property appropriated. As the determination of value is a fact question, resting solely within the province of the jury, the trial court should have instructed the jury on the nested lesser-offense of misdemeanor stealing.

Under ***Section 556.046,*** the circuit court is required to give an instruction on a

[4] RSMo. Cum. Supp. 2009.

lesser included offense when each of these requirements is met: "a. a party requests the instruction; b. there is a basis in the evidence for acquitting the defendant of the charged offense; and c. there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested." ***Jackson,*** 433 S.W.3d at 396 (footnote omitted). " 'Doubts concerning whether to instruct on a lesser included offense should be resolved in favor of including the instruction, leaving it to the jury to decide.' " ***State v. Williams,*** 313 S.W.3d 656, 660 (Mo. banc 2010) (quoting ***State v. Derenzy,*** 89 S.W.3d 472, 474–75 (Mo. banc 2002)).

Here, Mr. Smith timely requested the misdemeanor stealing instruction (TR 328-331; LF 67). It is also clear that there was a basis to acquit Mr. Smith of felony stealing. The jury did not have to believe that the value of the property was $500 or more. In discussing this requirement in ***Jackson,*** 433 S.W.3d at 399, this Court found that there is a basis to acquit the defendant of the greater offense in virtually every case. This is because "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 [between the greater and lesser offenses]." *Id.* This Court further explained that the jury's right to disbelieve all or any part of the evidence and to refuse to draw inferences constitutes a sufficient basis for acquittal regardless of the strength of the State's case:

> No matter how strong, airtight, inescapable, or even absolutely certain the evidence and inferences in support of the differential element may seem to judges and lawyers, no evidence *ever* proves an element of a criminal case

> until all 12 jurors believe it, and no inference *ever* is drawn in a criminal case until all 12 jurors draw it.

Id. at 400. Accordingly, there was a basis to acquit Mr. Smith of felony stealing because the jury did not have to believe that the value of the property appropriated was $500 or more. The jury could have believed that the value of the property was less than $500.

In ***State v.Pierce,*** 433 S.W.3d 424 (Mo. banc 2014), the evidence was sufficient to prove that the defendant, who was found in possession of cocaine base, committed second-degree trafficking in that the controlled substance weighed two or more grams. As such, the evidence also had to be sufficient to prove the nested lesser-included offense of possession, which includes all of the elements of second-degree trafficking except evidence of the controlled substance's weight. *Id.* at 432. The amount of drugs possessed was for the jury to decide. Similarly, here, if the evidence was sufficient to prove that Mr. Smith stole $500 or more worth of property, it was also sufficient to prove the nested lesser-included offense of stealing less than $500. Determining the value of the property was solely within the province of the jury, and they should have been instructed on both options.

Because misdemeanor stealing is a nested lesser offense of felony stealing, Mr. Smith was entitled to the instruction upon request, and this Court must reverse for a new trial.

IV.

The trial court erred in refusing to instruct the jury on the offense of trespass in the first degree as to Count 6, because that offense is a lesser included offense of burglary in the second degree, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser, since the question of Mr. Smith's intent was for the jury to decide, and the jury could have found that Mr. Smith knowingly entered the premises unlawfully, but not for the purpose of committing stealing therein.

Standard of Review

This Court's review of the circuit court's decision to give or refuse a requested jury 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. (footnote omitted).

Facts and Preservation

On September 27, 2012, an employee of Sedalia Tool and Manufacturing arrived for work and saw that the front door glass had been broken out (TR 240). Video cameras on the outside of the business recorded activity between 12:22-12:30 a.m., although no one could be identified from the video (TR 254-257).

A piece of steel had been thrown through the window of the front door (TR 240). A desk drawer in the reception area had been pried open, and there was damage to one of the vending machines (TR 238, 240). The door to another office had been busted open; the door lock was in pieces and the doorjamb was ripped apart (TR 241). The damage to both doors amounted to $350 (TR 242-243, 264). Two computers were missing from an office desk (TR 241). One laptop was worth $1,200 and the other laptop had a SURFCAM access key on the back of it (TR 243, 264). The SURFCAM key is software that is essential to the business and it was valued at $14,000 (TR 244).

An email from the previous day – dated September 26 – was found lying on top of an office desk and it had a smudge of blood on it (TR 241, 258-259, 269; Ex. 34). This blood was seized and tested; the DNA profile developed from the blood matched Mr. Smith's DNA profile (TR 179-183). The State charged Mr. Smith, in Count 6, with burglary in the second degree, alleging that Mr. Smith "knowingly entered unlawfully in [Sedalia Tool and Mgf.], for the purpose of committing stealing therein." (LF 22).

As to Count 6, the jury was instructed on the offense of burglary in the second degree (LF 51). As to this Count, defense counsel had also requested that the jury be instructed on the lesser-included offense of first degree trespass (TR 328-331; LF 68). Defense counsel argued that the jury should be allowed to believe or disbelieve some, all or none of the evidence, and that trespass should always be a lesser included charge of burglary (TR 328-331). The trial court refused to submit the requested instruction for trespass in the first degree (LF 68). The refused instruction read:

INSTRUCTION NO. ____

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

As to Count 6, if you find and believe from the evidence beyond a reasonable doubt: That on or about September 27, 2012, in the County of Pettis, State of Missouri, the defendant knowingly entered unlawfully in a building located at 1400 Sedalia Road, Sedalia, Missouri, and possessed by Sedalia Tool and Manufacturing,

then you will find the defendant guilty under Count 6 of trespass 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.

MAI-CR3d 323.56
Submitted by Defendant

(LF 68; Appendix A4).

The jury found Mr. Smith guilty of burglary in the second degree (TR 376; LF 75). Defense counsel included the failure to give this lesser-included instruction in Mr. Smith's motion for new trial (LF 82), which was overruled. Therefore, this issue is preserved for appellate review. ***Rules 28.03*** and ***29.11(d).***

Legal Analysis

As fully discussed in Points I and II, "it is impossible to commit burglary in the second degree without committing trespass in the first degree." ***State v. Blewett,*** 853 S.W.2d 455, 459 (Mo. App. W.D. 1993) (quoting ***State v. Neighbors,*** 613 S.W.2d 143, 147 (Mo. App. W.D. 1980). "Thus, there is no escape from the conclusion that trespass in the first degree is a lesser included offense of the greater offense of burglary in the second degree." *Id.*

The trial court erred in failing to instruct Mr. Smith's jury on trespass in the first degree, as a nested lesser offense of burglary in the second degree under Count 6, because it was solely within the province of the jury to determine whether Mr. Smith knowingly entered the premises unlawfully *for the purpose of stealing* (burglary), or whether he only knowingly entered unlawfully, period (trespass).

Under ***Section 556.046,*** the circuit court is required to give an instruction on a lesser included offense when each of these requirements is met: "a. a party requests the instruction; b. there is a basis in the evidence for acquitting the defendant of the charged offense; and c. there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested." ***Jackson,*** 433 S.W.3d at 396 (footnote omitted). " 'Doubts concerning whether to instruct on a lesser included offense should be resolved in favor of including the instruction, leaving it to the jury to decide.' " ***State v. Williams,*** 313 S.W.3d 656, 660 (Mo. banc 2010) (quoting ***State v. Derenzy,*** 89 S.W.3d 472, 474–75 (Mo. banc 2002)).

Here, Mr. Smith timely requested the trespass in the first degree instruction as to

Count 6 (TR 328-331; LF 68). It is also clear that there was a basis to acquit Mr. Smith of burglary in the second degree. The jury did not have to believe that Mr. Smith knowingly entered unlawfully *for the purpose of committing the crime of stealing therein.* The jury could have believed that Mr. Smith only knowingly entered unlawfully. And "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 [between the greater and lesser offenses]." ***Jackson,*** 433 S.W.3d at 399.

No matter how strong, airtight, inescapable, or even absolutely certain the evidence and inferences in support of the differential element may seem to judges and lawyers, no evidence *ever* proves an element of a criminal case until all 12 jurors believe it, and no inference *ever* is drawn in a criminal case until all 12 jurors draw it. *Id.* at 400. Accordingly, there was a basis to acquit Mr. Smith of burglary in the second degree because the jury did not have to believe that he knowingly entered unlawfully *for the purpose of stealing.*

Because trespass in the first degree is a nested lesser offense of burglary in the second degree, Mr. Smith was entitled to the instruction upon request, and this Court must reverse for a new trial.

V.

The trial court erred in refusing to instruct the jury on misdemeanor stealing as to Count 7, because that offense is a lesser included offense of felony stealing, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser, since the question of value was for the jury to decide, and the jury could have found that the value of the stolen items was less than $500.

Standard of Review

This Court's review of the circuit court's decision to give or refuse a requested jury 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.* (footnote omitted).

Facts and Preservation

General manager Rodney Walters testified that a piece of steel had been thrown through the window of the front door at Sedalia Tool and Manufacturing (TR 240). Two laptop computers were missing from an office desk (TR 241). Walters had no receipts for the missing equipment, and he was guessing about the amount of depreciation, but he estimated that one laptop was worth $1,200, and the other laptop had a SURFCAM

programming software access key on the back of it worth $14,000 (TR 243-244, 264). The State charged Mr. Smith, in Count 7, with Class C felony stealing, alleging that Mr. Smith "appropriated two laptop computers and software of a value of at least five hundred dollars, …without the consent of [the owners] and with the purpose to deprive them thereof." (LF 22).

As to Count 7, the jury was instructed on the offense of felony stealing (LF 46). As to this Count, defense counsel also requested that the jury be instructed on the lesser-included offense of misdemeanor stealing (TR 328-331; LF 69). Defense counsel argued that the jury should be allowed to believe or disbelieve some, all or none of the evidence, and that misdemeanor stealing should always be a lesser option for felony stealing (TR 328-331). The trial court refused to submit the requested instruction for misdemeanor stealing (LF 69). The refused instruction read:

INSTRUCTION NO. ____

As to Count 7, if you do not find the defendant guilty of stealing as submitted in Instruction No. ___, you must consider whether he is guilty of stealing under this instruction.

As to Count 7, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about September 27, 2012, in the County of Pettis, State of Missouri, the defendant took two laptop computers, property in the possession of Sedalia Tool and Manufacturing, and

Second, that defendant did so without the consent of Sedalia Tool and Manufacturing, and

Third, that defendant did so for the purpose of withholding it from the owner permanently,

then you will find the defendant guilty under Count 7 of stealing 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.

MAI-CR3d 324.02.1
Submitted by Defendant

(LF 69; Appendix A5).

The jury found Mr. Smith guilty of felony stealing as to Count 7 (TR 376; LF 76). Defense counsel included the failure to give this lesser-included instruction in Mr. Smith's motion for new trial (LF 82), which was overruled. Therefore, this issue is preserved for appellate review. ***Rules 28.03*** and ***29.11(d).***

Legal Analysis

As discussed in Point III, under ***Section 570.030***,[5] stealing is a Class A misdemeanor, unless, as charged in Mr. Smith's case, the value of the property appropriated is five hundred dollars or more but less than twenty-five thousand dollars. Then, it is a Class C felony. The only difference in the two crimes in the value of the property appropriated. As the determination of value is a fact question, resting solely

[5] RSMO Cum. Supp. 2009.

within the province of the jury, the trial court should have instructed the jury on the nested lesser-offense of misdemeanor stealing.

Under ***Section 556.046,*** the circuit court is required to give an instruction on a lesser included offense when each of these requirements is met: "a. a party requests the instruction; b. there is a basis in the evidence for acquitting the defendant of the charged offense; and c. there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested." ***Jackson,*** 433 S.W.3d at 396 (footnote omitted). " 'Doubts concerning whether to instruct on a lesser included offense should be resolved in favor of including the instruction, leaving it to the jury to decide.' " ***State v. Williams,*** 313 S.W.3d 656, 660 (Mo. banc 2010) (quoting ***State v. Derenzy,*** 89 S.W.3d 472, 474–75 (Mo. banc 2002)).

Here, Mr. Smith timely requested the misdemeanor stealing instruction as to Count 7 (TR 328-331; LF 67). It is also clear that there was a basis to acquit Mr. Smith of felony stealing. The jury did not have to believe that the value of the property was $500 or more. In discussing this requirement in ***Jackson,*** 433 S.W.3d at 399, the Supreme Court found that there is a basis to acquit the defendant of the greater offense in virtually every case. This is because "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 [between the greater and lesser offenses]." *Id.* The Court further explained that the jury's right to disbelieve all or any part of the evidence and to refuse to draw inferences constitutes a sufficient basis for acquittal regardless of the strength of the

State's case:

> No matter how strong, airtight, inescapable, or even absolutely certain the evidence and inferences in support of the differential element may seem to judges and lawyers, no evidence *ever* proves an element of a criminal case until all 12 jurors believe it, and no inference *ever* is drawn in a criminal case until all 12 jurors draw it.

Id. at 400. Accordingly, there was a basis to acquit Mr. Smith of felony stealing because the jury did not have to believe that the value of the property appropriated was $500 or more. The jury could have believed that the value of the property was less than $500.

In ***State v. Pierce,*** 433 S.W.3d 424 (Mo. banc 2014), the evidence was sufficient to prove that the defendant, who was found in possession of cocaine base, committed second-degree trafficking in that the controlled substance weighed two or more grams. As such, the evidence also had to be sufficient to prove the nested lesser-included offense of possession, which includes all of the elements of second-degree trafficking except evidence of the controlled substance's weight. *Id.* at 432. The amount of drugs possessed was for the jury to decide. Similarly, here, if the evidence was sufficient to prove that Mr. Smith stole $500 or more worth of property, it was also sufficient to prove the nested lesser-included offense of misdemeanor stealing less than $500. Determining the value of the property was solely within the province of the jury, and they should have been instructed on both options.

Because misdemeanor stealing is a nested lesser offense of felony stealing, Mr. Smith was entitled to the instruction, and this Court must reverse for a new trial.

VI.

The trial court erred in refusing to instruct the jury on the offense of trespass in the first degree as to Count 9, because that offense is a lesser included offense of burglary in the second degree, and failing to so instruct the jury violated Mr. Smith's rights to due process of law and to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser, since the question of Mr. Smith's intent was for the jury to decide, and the jury could have found that Mr. Smith knowingly entered the premises unlawfully, but not for the purpose of committing stealing therein.

Standard of Review

This Court's review of the circuit court's decision to give or refuse a requested jury 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.* (footnote omitted).

Facts and Preservation

In December, 2012, someone knocked a door out of the wall on the west side of the building that houses Cranker & Sons shop (TR 276). During this break-in, a key for the front door was stolen, along with $150 and a bottle of whiskey (TR 277). The intruder had left 2-3 shoeprints on the door (TR 279; Ex. 63-64). After this first break-in,

Mr. Crank reconstructed the entire front wall of the building, and closed off one of the doors (TR 278; Ex. 59-62). He also changed the locks and door knobs and installed a security camera (TR 280).

In March, 2013, another break-in occurred at the shop; the intruder tried the key that had been taken during the first break-in and bent it (TR 280). The bent door key was left on a table in the shop (TR 286; Ex. 71). The person then tried to kick in the front door (TR 280). Finally, the person gained access by climbing a snow pile and kicking in a window (TR 281). The security camera captured images of the person's face (TR 283-286; Ex. 72A-I). During this second entry, Mr. Crank's computer equipment was taken and a collectible toy (TR 281-282; Ex. 74).

When a search warrant was later executed at Mr. Smith's residence, shoes that matched a shoeprint left during the first break-in were found inside Mr. Smith's residence (TR 279, 298, 301; Ex. 63-64, 69-70). The State charged Mr. Smith, in Count 9, with burglary in the second degree, alleging that Mr. Smith "knowingly entered unlawfully in [Cranker and Sons], for the purpose of committing stealing therein." (LF 23).

As to Count 9, the jury was instructed on the offense of burglary in the second degree (LF 57). As to this Count, defense counsel also requested that the jury be instructed on the lesser-included offense of first degree trespass (TR 328-331; Supp. LF 1). Defense counsel argued that the jury should be allowed to believe or disbelieve some, all or none of the evidence, and that trespass should always be a lesser included charge of burglary (TR 328-331). The trial court refused to submit the requested instruction for trespass in the first degree (Supp. LF 1). The refused instruction read:

INSTRUCTION NO. ____

As to Count 9, if you do not find the defendant guilty of burglary in the second degree as submitted in Instruction No. ___, you must consider whether he is guilty of trespass in the first degree under this instruction.

As to Count 9, if you find and believe from the evidence beyond a reasonable doubt:

That on or about March 4, 2013, in the County of Pettis, State of Missouri, the defendant knowingly entered unlawfully in a building located at 501 E. 2nd Street, Sedalia, Missouri, possessed by Douglas Crank, doing business as Cranker and Sons, then you will find the defendant guilty under Count 9 of trespass 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.

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(Supp LF 1; Appendix A6).

The jury found Mr. Smith guilty of burglary in the second degree under Count 9 (TR 376; LF 78). Defense counsel included the failure to give this lesser-included instruction in Mr. Smith's motion for new trial (LF 82), which was overruled. Therefore, this issue is preserved for appellate review. ***Rules 28.03*** and ***29.11(d).***

Legal Analysis

As fully discussed in Points I, II and IV, "it is impossible to commit burglary in the second degree without committing trespass in the first degree." ***State v. Blewett,*** 853

S.W.2d 455, 459 (Mo. App. W.D. 1993) (quoting ***State v. Neighbors,*** 613 S.W.2d 143, 147 (Mo. App. W.D. 1980). "Thus, there is no escape from the conclusion that trespass in the first degree is a lesser included offense of the greater offense of burglary in the second degree." *Id.*

The trial court erred in failing to instruct Mr. Smith's jury on trespass in the first degree, as a nested lesser offense of burglary in the second degree under Count 9, because it was solely within the province of the jury to determine whether Mr. Smith knowingly entered the premises unlawfully *for the purpose of stealing* (burglary), or whether he only knowingly entered unlawfully, period (trespass).

Under ***Section 556.046,*** the circuit court is required to give an instruction on a lesser included offense when each of these requirements is met: "a. a party requests the instruction; b. there is a basis in the evidence for acquitting the defendant of the charged offense; and c. there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested." ***Jackson,*** 433 S.W.3d at 396 (footnote omitted). " 'Doubts concerning whether to instruct on a lesser included offense should be resolved in favor of including the instruction, leaving it to the jury to decide.' " ***State v. Williams,*** 313 S.W.3d 656, 660 (Mo. banc 2010) (quoting ***State v. Derenzy,*** 89 S.W.3d 472, 474–75 (Mo. banc 2002)).

Here, Mr. Smith timely requested the trespass in the first degree instruction as to Count 9 (TR 328-331; Supp. LF 1). It is also clear that there was a basis to acquit Mr. Smith of burglary in the second degree. The jury did not have to believe that Mr. Smith knowingly entered unlawfully *for the purpose of committing the crime of stealing therein.*

The jury could have believed that Mr. Smith only knowingly entered unlawfully. And "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 [between the greater and lesser offenses]." ***Jackson,*** 433 S.W.3d at 399.

> No matter how strong, airtight, inescapable, or even absolutely certain the evidence and inferences in support of the differential element may seem to judges and lawyers, no evidence *ever* proves an element of a criminal case until all 12 jurors believe it, and no inference *ever* is drawn in a criminal case until all 12 jurors draw it.

Id. at 400. Accordingly, there was a basis to acquit Mr. Smith of burglary in the second degree under Count 9 because the jury did not have to believe that he knowingly entered unlawfully *for the purpose of stealing.*

Because trespass in the first degree is a nested lesser offense of burglary in the second degree, Mr. Smith was entitled to the instruction, and this Court must reverse for a new trial.

VII.[6]

The trial court plainly erred in proceeding to trial, accepting the jury's verdict and imposing sentence on Count V, Burglary in the Second Degree, because these actions violated Mr. Smith's right to due process of law in that the crime was alleged to have occurred at the United States Post Office in Sedalia, Missouri, a federal enclave over which federal courts have exclusive jurisdiction under Article I, section 8, clause 17 of the United States Constitution and Sections 12.010 and 12.020, RSMo, and the trial court lacked subject matter jurisdiction to proceed on Count V.

Standard of Review

Mr. Smith seeks plain error review because his counsel did not raise this subject matter jurisdiction objection at trial. Whether preserved or not, an appellate court has

[6] This issue was not briefed in the Court of Appeals, Western District, except through a letter brief prior to oral argument. The issue was also discussed at oral argument and tangentially addressed in the Western District's opinion. Mr. Smith briefs this issue in this Court because it involves the trial court's lack of subject matter jurisdiction over Count five, which he asserts may be raised at any time. ***State ex rel. Laughlin v. Bowersox***, 318 S.W.3d 695, 703 (Mo. 2010) (If a criminal judgment was entered by a court without jurisdiction to do so, such a proceeding always should be found to be void, whether determined on direct appeal or in a habeas proceeding.) However, if this Court believes the briefing of this issue for the first time in this Court violates Rule 83.08(b), then he asks that the Court strike only this claim from consideration.

discretion to review "plain errors affecting substantial rights ... when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." ***Rule 30.20***.

Plain error review is a two-step process. ***State v. Shinkle***, 340 S.W.3d 327, 332-33 (Mo. App. W.D. 2011). First, the Court looks to whether the trial court committed an obvious error which affected Mr. Smith's substantial rights. *Id.* Then, if it finds such error, it determines whether the error resulted in a manifest injustice or miscarriage of justice. *Id.*

Analysis

Subject matter jurisdiction is the authority of a court to hear and decide a case. Missouri circuit courts have subject matter jurisdiction over criminal cases under article V, section 14 of the Missouri Constitution. ***J.C.W. ex rel. Webb v. Wyciskalla***, 275 S.W.3d 249, 253 n. 6 (2009). But no state, including Missouri, can grant subject matter jurisdiction to its courts to hear matters that federal law places under the "exclusive" jurisdiction of the federal courts. *Id.*; ***State ex rel. Laughlin v. Bowersox***, 318 S.W.3d 695, 698 (Mo. 2010).

Under Count 5, Mr. Smith was alleged to have committed burglary in the second degree for "knowingly enter[ing] unlawfully in a building...owned and possessed by the United States Postal Service, for the purpose of committing stealing therein." (LF 22). But Missouri statutes cannot apply in an area under the exclusive jurisdiction of the federal government. ***State ex rel. Laughlin v. Bowersox***, 318 S.W.3d at 701.

In ***Laughlin***, the defendant was convicted and sentenced to prison by the Newton County circuit court for burglary and property damage crimes occurring in the United

States post office in Neosho. ***Laughlin***, 318 S.W.3d at 697. On state habeas review, this Court reversed Laughlin's convictions, noting that Missouri does not have jurisdiction over land or a building that is under the exclusive jurisdiction of the United States, *see* ***Section 12.010*** and ***Section 12.020***; therefore, a Missouri statute cannot grant subject matter jurisdiction to its courts for cases that are within the exclusive jurisdiction of the federal courts. *Id.* at 699-701. Because the circuit court had no jurisdiction to try Laughlin for these crimes, this Court reversed his convictions.

Similarly, the circuit court here had no jurisdiction to try, convict or sentence Mr. Smith under Count V, under state law, for burglary of a United States Post Office. If, in fact, Mr. Smith's state of mind was to violate the law, it was to violate federal statutes making it a crime to burglarize and damage federal property. *Id.* Under the Supremacy Clause of the United States Constitution, no state can enact a law that infringes on the supremacy of the federal government. *Id.* at 700-701. In this case, the federal government had exclusive jurisdiction over the land of the United States Post Office in Sedalia. *Id.* (See 18 U.S. C. Section 2115 (1993) (burglary, punishable by up to five years in a federal prison); 18 U.S.C. Section 1361 (1993) (federal property damage, punishable by up to one year if the damage is less than $100 and up to ten years in federal prison if the damage exceeds $100)).

Because this Court can raise jurisdiction *sua sponte*, and jurisdictional defects cannot be waived, ***Clay v. Dormire***, 37 S.W.3d 214, 221 (Mo. banc 2000), Mr. Smith asks this Court to review the jurisdictional issue as to Count 5, and reverse Mr. Smith's conviction and sentence.

CONCLUSION

For the reasons set forth above, this Court must reverse Mr. Smith's convictions and remand for a new trial on Counts 1, 2, 3, 4, 6, 7, 9 & 10, and reverse his conviction and discharge him under Count 5.

Respectfully submitted,

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Certificate of Compliance

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b), and was completed using Microsoft Word, Office 2010, 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 **13,772** words, which does not exceed the 31,000 words allowed for an appellant's substitute brief.

On this 23rd day of May, 2016, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Amy M. Bartholow

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Amy M. Bartholow