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 REPLY BRIEF

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STATEMENT OF FACTS

Mr. Smith relies on the Statement of Facts from his opening Substitute brief.

ARGUMENT[1]

I-VI.

The trial court erred in refusing Mr. Smith's requested nested lesser included offense instructions as to Counts 1, 3, 4, 6, 7, and 9, and prejudice is presumed.

Respondent's Concessions

Respondent concedes that the trial court erred in failing to instruct Mr. Smith's jury on trespass in the first degree in Count 1, because it is a nested lesser-included offense of burglary in the first and second degrees (Resp. Br. 13-14). Instead, Respondent argues that no prejudice resulted from this instructional error because the jury was instructed on both first and second degree burglary and returned a verdict for first degree (Resp. Br. 17-18). Mr. Smith argues that neither of the two burglary instructions tested his intent to steal at the time of entry – the differential element – regardless of whether the jury ultimately found that he stole something after he was inside, in this case a gun, which is what elevated the crime to first degree.

Respondent also concedes that the trial court erred in failing to instruct Mr. Smith's jury on trespass in the first degree in Counts 3, 6 and 9, because it is a nested lesser offense of burglary in the second degree (Resp. Br. 26, 28, 30). Instead, Respondent argues that no prejudice resulted from this instructional error because the

[1] Respondent replies to Points I-VI of Mr. Smith's opening brief with one consolidated Argument, essentially making the same response as to each of the six points. Therefore, Mr. Smith will respond in one consolidated Reply argument.

evidence, in Respondent's opinion, was "very strong" or "strong" to show intent to commit a second degree burglary, not just a trespassing, and there is not a reasonable probability that the jury would have found trespassing (Resp. Br. 27-29, 31). Mr. Smith argues that neither Respondent nor the Court gets to parse the evidence to determine what verdict the jury would have returned had it been properly instructed on the nested lesser included offense of trespassing. The evidence and inferences in support of the differential element may only be drawn by the jury. *See State v. Jackson*, 433 S.W.3d 390, 400 (Mo. banc 2014).

Respondent further concedes error in the trial court's failure to instruct Mr. Smith's jury on misdemeanor stealing as to Counts 4 and 7, because misdemeanor stealing is a nested lesser-included offense of felony stealing (Resp. Br. 31-32). In the Court of Appeals, Respondent also conceded prejudice and a remand for a new trial on these two counts, but Respondent has withdrawn this concession in this Court (Resp. Br. 31, fn. 3). Instead, Respondent argues that no prejudice resulted from this instructional error because the evidence of value, in Respondent's opinion, was "strong and uncontroverted" (Resp. Br. 32, 33). Again, this Court has rejected attempts to characterize a prejudice argument in the terms of a sufficiency review, i.e., that the evidence in this case does not support a conviction for misdemeanor stealing. *See State v. Pierce*, 433 S.W.3d 424, 432 (Mo. banc 2014). The jury – and only the jury – is the final arbiter of what that evidence does and does not prove. *Id.* at 433. The evidence and inferences in support of the differential element may only be drawn by the jury. *See Jackson, supra.*

Prejudice is presumed from these instructional errors because a finding of the higher offenses necessarily proved conduct sufficient to establish the lesser offenses but the jury's resolve on the differential elements was not tested by the remaining instructions.

The common refrain in Respondent's arguments under Points I-VI, is that this Court was wrong in *State v. Jackson*, *supra*, to presume prejudice from the trial court's failure to instruct on each of the nested lesser-included offenses – instructions which would have tested the jury's resolve on the differential element at issue (Resp. Br. 14-15). But this issue has already been resolved by this Court's opinions, not just in the last two years – *see Jackson, supra, Pierce, supra, State v. Roberts*[2] and *State v. Randle*,[3] - but also decades of prior case law that has presumed prejudice in similar scenarios. *See State v. Redmond*, 937 S.W.2d 205, 210 (Mo. banc 1996) (prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence). There is no need for this Court to reexamine what is already settled law.[4]

[2] 465 S.W.3d 899 (Mo. banc 2015).

[3] 465 S.W.3d 477 (Mo. banc 2015).

[4] "The doctrine of *stare decisis*—to adhere to decided cases—promotes stability in the law by encouraging courts to adhere to precedents." *State v. Honeycutt*, 421 S.W.3d 410, 422 (Mo. banc 2013) (quoting *Med. Shoppe Int'l, Inc. v. Dir. of Revenue,* 156 S.W.3d 333, 334–335 (Mo. banc 2005). Decisions of this Court should not be lightly overruled, especially when "the opinion has remained unchanged for many years." *Sw. Bell Yellow Pages, Inc. v. Dir. Of Revenue*, 94 S.W.3d 388, 391 (Mo. banc 2002).

Further, *Rule 28.02(f)* – which requires that prejudice be "judicially determined," does not change the analysis, contrary to Respondent's assertion (Resp. Br. 15). Rather, the "judicial determination" already has been made by this Court that, where a nested lesser-included instruction would have tested the differential element in the case, prejudice results from the trial court's error in failing to so instruct. Also, where the remaining instructions fail to test the jury's resolve on the differential element of the crime, prejudice results. *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).

Therefore, in Counts 1, 3, 6, and 9, 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. Prejudice is presumed.

In Counts 4 and 7, the failure to submit a misdemeanor stealing instruction left no way to test the jury's resolve as to the value of the alleged stolen property. If the evidence was sufficient to establish 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. Prejudice is presumed. *See Pierce*, 433 S.W.3d at 432.

This Court should reverse Mr. Smith's convictions on each of these six counts and remand for a new trial.

CONCLUSION

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

Respectfully submitted,

/s/ Amy M. Bartholow

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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, and this certificate of compliance and service, the reply brief contains **1,290** words, which does not exceed the 7,750 words allowed for an appellant's substitute reply brief.

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

/s/ Amy M. Bartholow

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