No. SC95461

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

JAMES CALVIN SMITH,

Appellant.

Appeal from the Pettis County Circuit Court
Eighteenth Judicial Circuit
The Honorable Robert L. Koffman, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF FACTS

Mr. Smith appeals his convictions of one count of burglary in the first degree (Count 1), four counts of burglary in the second degree (Counts 3, 5, 6, and 9), four counts of felony stealing (Counts 2, 4, 7, and 10), one count of resisting arrest (Count 11), and one count of property damage in the second degree (Count 8) (*see* L.F. 83-87). Mr. Smith asserts that the trial court erred in failing to submit instructions for lesser included offenses on Counts 1, 3, 4, 6, 7, and 9, and that the trial court plainly erred in proceeding to trial on Count 5 due to a lack of jurisdiction (App.Sub.Br. 13-19). Mr. Smith does not assert any error as to Counts 2, 8, 10, and 11.

* * *

On April 11, 2012, Cole Watring discovered that there had been a break-in at a landscaping business that he owned (Tr. 184-185). Someone had broken through the fence and into a cargo trailer and stolen some items (Tr. 185). The fence had been cut open (Tr. 192).

Mr. Watring's computer and tablet were stolen from his office, and his trimmers and leaf blowers were stolen from the trailer (Tr. 186-187). A bicycle was also stolen from his office, but it was found nearby (Tr. 187-188). The bicycle had apparently been thrown over the fence, and it was "all bent up" (Tr. 188). The trimmers were less than two weeks old, the leaf blowers were about a year old, the computer was less than three months old, and the

tablet was less than half a year old (Tr. 188). The stolen items had a total market value of $2,479.91 (Tr. 188-189; State's Ex. 73).

Robert Cashman had a large camper parked inside the fence, and it had also been broken into (Tr. 192-195). The glass in the front door had been broken, and some items inside were missing (Tr. 195). A television was missing from the kitchen, and a handgun was missing from the master bedroom (Tr. 195-196).

On the north side of the property, police found a small, black manicure set and a cigarette butt (Tr. 201-202). The items were found near the place in the fence that had been cut open (Tr. 201-202). The cigarette butt did not appear to be weathered, and it was lying on top of the grass (Tr. 203-204).

Subsequent testing of the cigarette butt revealed the presence of DNA, and the DNA profile was entered into the Combined DNA Index System (CODIS) (Tr. 170, 172-173, 209). The profiled generated a "hit," and the DNA matched Mr. Smith's DNA (Tr. 173-175, 209). The DNA profile had "an approximate frequency of 1 in 1.729 sextillion in the Caucasian population and 1 in 71.58 quintillion in the black population" (Tr. 176). Detective Travis St. Cyr collected a DNA sample from Mr. Smith to confirm the hit (Tr. 209-210). He asked Mr. Smith if he wanted to know why he was getting DNA from him, and Mr. Smith said, "No, I will just find out in court" (Tr. 211).

On August 7, 2012, Juanita Hartman arrived at the Sedalia Post Office

a little before 4:00 a.m. for work (Tr. 216-217). She learned that there had been a break-in (Tr. 217). A window had been broken with a brick, and items inside had been disturbed and moved around (Tr. 217, 221, 228-229). There was "a very small dot of blood" on the broken window's frame, and there was a blood smear on another window (Tr. 228, 230).

Testing of a swab of the blood on the window frame revealed the presence of DNA, and the DNA profile on the swab matched Mr. Smith's DNA (Tr. 177-179). The DNA profile had an approximate frequency of 1 in 1.729 sextillion in the Caucasian population and 1 in 71.58 quintillion in the black population (Tr. 179).

On September 27, 2012, Rodney Walters, the general manager at Sedalia Tool and Manufacturing, received a call from one of the employees at about 3:15 a.m. (Tr. 237-238). A vending machine at the business had been vandalized by someone trying to pry it open (Tr. 238). A window had been broken with a piece of steel, and interior doors had been broken into (Tr. 240-241, 266). Some items had been stolen, and there was a spot of blood on an e-mail that had been printed on a piece of paper (Tr. 241, 258-259, 269).

A laptop computer was missing from the office (Tr. 241). The laptop had a value of approximately $1,200 (Tr. 243). The damage to interior doors cost about $550 dollars to repair (Tr. 242-243). A second laptop computer worth about $50 was stolen, but it contained a "SURFCAM access key" that had a

value of $14,000 (Tr. 243-244). Other tools and tool parts worth an estimated $100,000 were left untouched (Tr. 245-246). Many other items had been damaged, moved, or disturbed (Tr. 246-252). Surveillance video outside the building showed a person on foot, but the person's face was obscured by a motorcycle helmet (Tr. 254).

Testing of the "spot of a red/brown substance" on the printed email revealed that the spot "screened positive for the presence of blood" (Tr. 180). A DNA profile was developed from the blood, and the DNA profile matched Mr. Smith's DNA (Tr. 180-182).

Detective Jill Green talked to Mr. Smith about the break-in at Sedalia Tool and Manufacturing (Tr. 274). Mr. Smith said he did not know where it was, and he said he had never been there (Tr. 274-275).

In December 2012, there was a break-in at Douglas Crank's repair shop in Sedalia (Tr. 275-276). A door was broken in, and some money and whiskey was stolen (Tr. 276-277). A key to the front door was also stolen (Tr. 277). The burglar left shoe prints on the broken door (Tr. 279).

In March 2012 (after the locks had been changed), there was a second break-in at Mr. Crank's shop (Tr. 280). There were footprints on the door where someone had tried to kick it in, but Mr. Crank had reinforced the door with metal (Tr. 280, 282). The key previously stolen from the shop was bent in the new lock (Tr. 280, 302). A window was broken, and several items were

stolen from inside the shop (Tr. 281, 291). The stolen items included a computer, vinyl cutter software, a Miller motorcycle welder, a stereo receiver, and a bottle of McCormick (Tr. 281; State's Ex. 74). The stolen items had an estimated value of $1,274.71 (State's Ex. 74). A surveillance camera captured pictures of the burglar, Mr. Smith (Tr. 283-284, 286, 298).

A search of Mr. Smith's house did not turn up Mr. Crank's property (Tr. 300). Mr. Smith was not present when the search warrant was executed (Tr. 299). The police found a pair of Adidas Beckenbauer athletic shoes (Tr. 301). The tread matched prints left during the break-in at Mr. Crank's shop (*see* Tr. 279, 301; State's Ex. 63-64, 66, 69-70).

On March 20, 2013, Officer Joshua Howell found Mr. Smith walking on the street (Tr. 304). Officer Howell stopped and gestured for Mr. Smith to come to him (Tr. 306). Mr. Smith veered in a different direction (Tr. 306). Officer Howell asked Mr. Smith to take his hands out of his pockets and put them behind his back because he was under arrest (Tr. 207). Mr. Smith backed up and asked what it was about (Tr. 307).

Officer Howell said he would explain, but that he needed Mr. Smith to put his hands behind his back (Tr. 307). Mr. Smith refused, and Officer Howell grabbed his arm (Tr. 307). Mr. Smith continued to back away, so Officer Howell forced him to the ground and eventually put him in handcuffs after a brief struggle (Tr. 307-308).

At the police station, Mr. Smith denied any involvement in the burglary of Mr. Crank's shop (Tr. 310-311). When confronted with the surveillance camera photographs, Mr. Smith said that "it wasn't him" (Tr. 311). Officer Howell asked Mr. Smith to help the police recover the stolen items, and Mr. Smith said that he "would not do that because then [Officer Howell] would have something on him" (Tr. 311-312).

The State ultimately charged Mr. Smith with one count of the class B felony of burglary in the first degree, four counts of the class C felony of stealing, four counts of the class C felony of burglary in the second degree, one count of the class D felony of property damage in the first degree, and one count of the class D felony of resisting arrest (L.F. 22-23). The State also charged that Mr. Smith was a prior and persistent offender (L.F. 23-24).

At trial, the jury found Mr. Smith guilty of all of the charged offenses (Tr. 375-377; L.F. 70-80). The court sentenced Mr. Smith as follows: for burglary in the first degree (Count 1), ten years' imprisonment, for each count of burglary in the second degree and stealing (Counts 2-7, 9-10), seven years' imprisonment, and for property damage in the second degree and resisting arrest, four years' imprisonment (Tr. 388-389). The court ordered the seven and four-year sentences to run concurrently with each other but consecutively to the ten-year sentence imposed on Count 1, for a total of seventeen years' imprisonment (Tr. 389).

ARGUMENT

I.

The trial court erred in refusing Mr. Smith's included offense instructions as to Counts 1, 3, 4, 6, 7, and 9, but because Mr. Smith was not prejudiced, the Court should affirm Mr. Smith's convictions and sentences. (Responds to Points I-VI of appellant's brief.)

In his first six points, Mr. Smith asserts that the trial court erred in refusing to submit included-offense instructions he requested as to Counts 1, 3, 4, 6, 7, and 9 (App.Sub.Br. 13-18).

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 instruct the jury on the included offense of trespass in the first degree as to Count I, but Mr. Smith was not prejudiced (Point I)

1. The trial court erred in refusing the instruction

As to Count 1, the trial court instructed the jury on the charged offense of burglary in the first degree (L.F. 38). The trial court also instructed the jury on the included offense of burglary in the second degree (L.F. 40), but the jury found Mr. Smith guilty of the greater offense.

Mr. Smith requested an instruction on the additional lesser-included offense of trespass in the first degree, arguing that the jury should be free to disbelieve any part of the evidence and find Mr. Smith guilty of merely trespassing (Tr. 329). The trial court refused the instruction, relying on *State v. Green*, 812 S.W.2d 779 (Mo.App. W.D. 1991) (Tr. 331; L.F. 65). In light of this Court's decisions in *State v. Jackson*, *supra*, and *State v. Pierce*, 433

S.W.3d 424 (Mo. 2014), however, the trial court's reasoning was incorrect.

"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 when "(1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" § 556.046.1(2), RSMo Cum. Supp. 2013.

Here, trespass in the first degree was an included offense of burglary in the second degree. *See State v. Neighbors*, 613 S.W.2d 143, 147 (Mo.App. W.D. 1980). The only difference between the two offenses was Mr. Smith's intent of entering the property "for the purpose of committing the crime of stealing therein," which was an element of burglary but not of trespass (*see* L.F. 40, 65). Thus, trespass in the first degree was an included offense because it was "established by proof of the same or less than all the facts required" to prove burglary in the second degree, *i.e.*, it was "nested" within the offense of burglary in the second degree.

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. Smith made a timely request. Moreover, there was also a basis to acquit Mr. Smith of the greater offense and a basis to convict him of the included offense.

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. Thus, here, because the jury did not have to believe or infer that Mr. Smith entered the property with the purpose of committing stealing, there was a basis to acquit Mr. Smith of burglary in the second degree. And, inasmuch as trespass in the first degree was otherwise proved by the evidence showing that Mr. Smith unlawfully entered the property, there was also a basis to convict Mr. Smith of the included offense of trespass in the first degree.

2. The Court should not presume prejudice

Citing *Jackson*, 433 S.W.3d at 395, n. 4, Mr. Smith asserts that the trial court's error requires a new trial because "prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence" (App.Sub.Br. 28-29). But while the Court has stated in some cases that such error 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 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.

Moreover, in *Jackson*, the Court acknowledged that it was "logically inconsistent" to find prejudice under the facts of that case. 433 S.W.3d at 395, n. 4. However, the Court declined to "reconcile" the inconsistency and instead adhered to the "presumed prejudice" rule that has been applied in some prior cases. Respondent submits that the Court should now reconcile the logical inconsistency that can arise in cases like this case and adopt a prejudice analysis that focuses on the fairness of the defendant's trial.

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 9Mo. 2006)).

3. Mr. Smith 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. Smith's trial.[1]

a. The general rule. First, a longstanding rule in Missouri has been that "[t]he failure to give a different lesser-included offense instruction is

[1] 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.

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 at 575 (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 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, as to Count 1, the jury was instructed on the charged offense of burglary in the first degree and on the included offense of burglary in the second degree (L.F. 38, 40). But despite having the option of finding Mr. Smith guilty of a lesser offense, the jury found him guilty of the greater offense. In addition, the jury also found him guilty of the intended stealing, which was charged in Count 2 (L.F. 42, 71). Accordingly, there is no reason to believe that the jury was not convinced beyond a reasonable doubt of Mr. Smith's guilt of the greater offense, and it cannot be said that Mr. Smith was prejudiced by the absence of yet another lesser included offense instruction.

Mr. Smith asserts that the longstanding rule should not be applied in his case because the instruction on the lesser offense of burglary in the second degree (which differed only insofar as it did not posit the use of a gun during the burglary "did not test whether the jury might have found that Mr.

Smith did not enter with *any* intent to steal" (App.Sub.Br. 27). Mr. Smith cites *State v. Nutt*, 432 S.W.3d 221 (Mo.App. W.D. 2014), and *State v. Frost*, 49 S.W.3d 212, 221 (Mo.App. W.D. 2001), and he asserts that "[t]he only way to test that intent [to commit stealing] was to submit the requested trespass in the first degree instruction[, which lacked that element], in addition to burglary in the second degree" (App.Sub.Br. 27). 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. Smith'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."

In addition, 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. Smith was guilty of burglary in the first degree or burglary in the second degree (but unwilling to acquit him completely because he was plainly guilty of something)—chose the more serious offense of burglary in the first degree rather than burglary in the second degree 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. Smith guilty of the greater offense of burglary 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*, the Court should nevertheless find that Mr. Smith 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.*

Here, by contrast, the evidence that supported the inference that Mr. Smith *had* the intent to commit stealing when he unlawfully entered did not similarly support an inference that he *did not have* the intent to commit stealing when he unlawfully entered. In short, unlike in *Frost*, where the evidence of the defendant's culpable mental state for the greater offense was also "consistent" with the defendant's claim of reckless self-defense (and, thus, could have reasonably produced a verdict on either the greater or lesser offense), there was no reasonable probability here that the evidence of Mr. Smith's guilt would have led the jury to conclude that Mr. Smith did not have

the intent to commit stealing when he unlawfully entered the property.[2]

To the contrary, the evidence and inferences that showed Mr. Smith's intent to commit stealing included the fact that Mr. Smith cut through a fence to enter the property where the camper was located, that Mr. Smith broke into the camper, that Mr. Smith stole items from the camper, and that Mr. Smith stole other items from another building located on the same property (Tr. 185-188, 192-196). There was no reasonable probability that the jury—which ultimately found that Mr. Smith unlawfully entered with the intent to commit stealing—would have found Mr. Smith guilty of merely trespassing.

Missouri courts have previously observed that ". . . [w]hen the State has shown an intent to commit a crime and there is no ambiguity in a defendant's purpose for being in a building, there is no basis for an

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

instruction on first degree trespass.'" *State v. Green*, 812 S.W.2d 779, 788 (Mo.App. W.D. 1991) (quoting *State v. Portwood*, 694 S.W.2d 831, 832 (Mo.App.E.D. 1985)). In *Green*—which the trial court relied on to refuse the trespassing instruction in this case—the Court held, "The evidence proving appellant's guilt of burglary in the second degree was "strong and substantial and the evidence clearly showed commission of the more serious crime as charged, it was not therefore necessary to instruct on a lesser and included offense.'" *Id.* (quoting *State v. Craig*, 433 S.W.2d 811, 815-816 (Mo. 1968)).

Although cases like *Green* cannot be relied on after *Jackson* to justify a trial court's refusing to submit a lesser included offense (*i.e.*, they cannot be cited to suggest that there was no error), the logic of such cases still has force in analyzing the probability of a different verdict in a given case. In short, where the evidence supporting the verdict strongly shows that the defendant had an intent to commit stealing, it is permissible for a reviewing court to consider the strength of the evidence in making the judicial determination of whether the trial court's error in refusing a trespass instruction was prejudicial and deprived the defendant of a fair trial.

In sum, the evidence showed that Mr. Smith unlawfully entered the property and the camper where he stole multiple items, and there was no evidence that he unlawfully entered for some purpose other than to commit stealing. Thus, while there was a basis to convict Mr. Smith of trespassing—

and the trial court erred in refusing to submit the requested instruction—there was no reasonable probability that the jury, having found Mr. Smith guilty of burglary and the underlying stealing, would have decided instead to find him guilty of trespassing if an instruction for that offense had been submitted to it. Point I should be denied.

C. The trial court erred in refusing to instruct the jury on the included offense of trespass in the first degree as to Count 3 but Mr. Smith was not prejudiced (Point II)

As to Count 3, the trial court instructed the jury on the charged offense of burglary in the second degree (L.F. 44). The trial court refused Mr. Smith's proffered instruction for the included offense of trespass in the first degree (Tr. 331; L.F. 66).

As outlined above, trespass in the first degree is an included offense that is "nested" within the charged offense of burglary in the second degree. As such, upon request, and because the jury could have disbelieved that Mr. Smith had the intent to commit stealing when he unlawfully entered, the trial court should have submitted the included-offense instruction. However, the Court should not presume prejudice, and a review of the record reveals that there is no reasonable probability that the jury would have found Mr. Smith guilty of trespassing on Count 3 if a trespassing instruction had been submitted to it.

The burglaries charged in Counts 1 and 3 were both committed on the same day (April 10, 2012) and at the same location (208 N. Mill, Sedalia, Missouri). The evidence and inferences from the evidence showed that Mr. Smith cut through a fence to enter the property where the burgled building was located, that Mr. Smith stole items from the building, that Mr. Smith also broke into a camper located on the property, and that Mr. Smith stole more items from the camper (*see* Tr. 185-188, 192-196). The jury found Mr. Smith guilty of burglary in the first degree on Count 1, despite having the option of finding him guilty of a different, lesser-included offense, and it found him guilty of burglary in the second degree on Count 3. The jury also found Mr. Smith guilty of both of the intended stealing offenses, which were submitted in Counts 2 and 4. It is, thus, apparent that the jury was firmly convinced that Mr. Smith had the intent to commit stealing when he entered the property.

Mr. Smith points out that the jury did not have to believe that he had the intent to commit stealing (App.Sub.Br. 34). The verdicts, however, show that the jury *did* believe he had the intent to commit stealing, and, in reviewing for prejudice, the question should be whether there was any reasonable probability that the jury would have believed that he *did not have* the intent to commit stealing. Mr. Smith does not point to any evidence suggesting that his intent when he unlawfully entered was anything other

than to commit stealing.

In sum, in light of the jury's findings of guilt on Counts 1-4, and because the evidence of Mr. Smith's intent to commit stealing was very strong, there is no reasonable probability that the jury would have found Mr. Smith guilty of trespassing instead of burglary. Point II should be denied.

D. The trial court erred in refusing to instruct the jury on the included offense of trespass in the first degree as to Counts 6 and 9, but Mr. Smith was not prejudiced (Points IV and VI)

1. Mr. Smith was not prejudiced as to Count 6 (Point IV)

As to Count 6, the trial court instructed the jury on the charged offense of burglary in the second degree, which was based upon his unlawfully entering Sedalia Tool and Manufacturing "for the purpose of committing the crime of stealing therein" (L.F. 51). The trial court refused Mr. Smith's proffered instruction for the included offense of trespassing in the first degree, which posited that Mr. Smith merely entered unlawfully without any purpose to commit stealing (Tr. 331; L.F. 68).

For the reasons discussed above, the trial court erred in refusing the instruction. The jury was free to disbelieve that Mr. Smith entered with a purpose to commit stealing; thus, there was a basis to acquit of burglary in the second degree and convict of trespass in the first degree. However, there is no reasonable probability that the jury would have found Mr. Smith guilty

of trespassing if the instruction had been submitted to it.

The evidence and inferences from the evidence showed that Mr. Smith vandalized a vending machine at Sedalia Tool and Manufacturing trying to pry it open (Tr. 237-238). The evidence showed that he broke a window with a piece of steel and broke open interior doors (Tr. 240-241, 266). He stole a laptop worth about $1,200, a laptop worth about $50, and a "SURFCAM access key" worth about $14,000 (which was contained on the $50 laptop) (Tr. 242-244). When questioned about the break-in, Mr. Smith said that he did not know where the business was located and that he had never been there (Tr. 274-275). A drop of Mr. Smith's blood, however, was found at the business (Tr. 180-182, 241, 258-259, 269).

As is evident, there was strong evidence of an unlawful entry, coupled with evidence that multiple items were stolen from inside the business. There was no evidence that Mr. Smith unlawfully entered the business with an intent to do anything other than commit stealing. In fact, when questioned by the police, Mr. Smith simply denied that he had ever been to the business (Tr. 274-275). Thus, inasmuch as the jury found Mr. Smith guilty of the burglary of the business (Count 6), the stealing from the business (Count 7), and the property damage to the business (Count 8), there is no reasonable probability that the jury would have found him guilty of merely trespassing when he unlawfully entered the business. Point IV should be denied.

2. Mr. Smith was not prejudiced as to Count 9 (Point VI)

Likewise, as to Count 9, the trial court erred in refusing Mr. Smith's proffered instruction for trespass in the first degree, which posited that Mr. Smith merely entered unlawfully Mr. Crank's business without any purpose to commit stealing (*see* Tr. 331; Supp. L.F. 1). But, again, Mr. Smith was not prejudiced.

The evidence and inferences from the evidence showed that, in December 2012, Mr. Smith broke into Douglas Crank's repair shop (Tr. 275-276). Mr. Smith broke in a door and stole some money and whiskey (Tr. 276-277). He also stole a key to the front door (Tr. 277). While there, Mr. Smith left shoe prints on the broken door (Tr. 279). A pair of shoes later found in Mr. Smith's home had treads that matched prints left during the break-in at Mr. Crank's shop (*see* Tr. 279, 301; State's Ex. 63-64, 66, 69-70).

In March 2012 (after the locks had been changed), Mr. Smith broke into Mr. Crank's shop again (Tr. 280). The key previously stolen from the shop was bent in the new lock (Tr. 280, 302). Mr. Smith broke a window and stole several items from inside the shop, including a computer, vinyl cutter software, a Miller motorcycle welder, a stereo receiver, and a bottle of McCormick (Tr. 281, 291; State's Ex. 74). The stolen items had an estimated value of $1,274.71 (State's Ex. 74). This time, a surveillance camera captured pictures of Mr. Smith (Tr. 283-284, 286, 298).

Here, again, there was strong evidence that Mr. Smith entered the shop unlawfully, and that he entered with the intent to commit stealing. The jury found Mr. Smith guilty of burglary (Count 9) and stealing (Count 10). There was no evidence that Mr. Smith entered unlawfully with any intent other than stealing. Accordingly, there is no reasonable probability that the jury would have found Mr. Smith guilty of merely trespassing when he unlawfully entered the business. Point VI should be denied.

E. The trial court erred in refusing to instruct the jury on the included offenses of misdemeanor stealing as to Counts 4 and 7, but Mr. Smith was not prejudiced (Points III and V)[3]

1. Mr. Smith was not prejudiced as to Count 4 (Point III)

As to Count 4, the trial court instructed the jury on the charged offense of stealing $500 or more (L.F. 46). This count of stealing was based on the theft of "three string trimmers, three blowers, a laptop computer, and a tablet device" from Cole Watring, who owned "Cole's Cutting Edge Lawn Service"

[3] In the Court of Appeals, respondent conceded that Counts 4 and 7 should be remanded for a new trial (Resp.Br. 16-17). After further consideration of Rule 28.02 and relevant case law (as discussed above in I.B.2), respondent believes that a prejudice analysis in light of the evidence and the jury's verdicts compels of different result.

(L.F. 46). Mr. Smith proffered an instruction for the offense of misdemeanor stealing, which was based on stealing the same items, but which would have permitted the jury to find him guilty of a misdemeanor if it did not believe that the various stolen items had a value of at least $500 (L.F. 67).

Because the jury was free to disbelieve the valuation of the property and conclude that it was not worth at least $500, the trial court should have submitted Mr. Smith's proffered instruction. However, because the evidence of value was strong and uncontroverted, Mr. Smith was not prejudiced.

The evidence showed that the trimmers were less than two weeks old, that the leaf blowers were about a year old, that the computer was less than three months old, and that the tablet was less than half a year old (Tr. 188). The stolen items had a total market value of $2,479.91 (Tr. 188-189; State's Ex. 73). There was no evidence that the stolen property had a market value of less than $500. Accordingly, there was no reasonable probability that the jury—if asked to consider misdemeanor stealing—would have concluded that the property was worth less than $500. Point III should be denied.

2. Mr. Smith was not prejudiced as to Count 7 (Point V)

In Count 7, Mr. Smith was charged with stealing "two laptop computers" from Sedalia Tool and Manufacturing (*see* L.F. 53). Because the jury did not have to believe that the two computers had a value of at least $500 dollars, the trial court should have submitted Mr. Smith's proffered

instruction for the included offense of misdemeanor stealing. However, because the evidence of value was strong and uncontroverted, Mr. Smith was not prejudiced.

The evidence showed that one of the laptop computers had a value of approximately $1,200 (Tr. 243). A second laptop computer worth about $50 was stolen, but it contained a "SURFCAM access key" that had a value of $14,000 (Tr. 243-244). There was no evidence that the stolen laptops had a market value of less than $500. Thus, there was no reasonable probability that the jury would have concluded that the property was worth less than $500. Point V should be denied.

II.

The trial court did not plainly err in failing to dismiss Count 5 *sua sponte*, because Mr. Smith has not demonstrated that the trial court lacked subject matter jurisdiction over the offense. (Responds to Point VII of appellant's brief.)

In his seventh point, Mr. Smith asserts that the trial court plainly erred in proceeding to trial on Count 5 (App.Sub.Br. 55). He asserts that because he burgled a United States Post Office, the trial court lacked subject matter jurisdiction (App.Br. 55). However, because it is not apparent that the trial court lacked subject matter jurisdiction—*i.e.*, because the record does not reveal that the federal government has accepted "exclusive" jurisdiction over the post office located at 405 E. 5th St. in Sedalia, Missouri—the trial court should not be convicted of plain error.

Missouri courts lack subject matter jurisdiction over "matters that federal law places under the 'exclusive' jurisdiction of the federal courts." *State ex rel. Laughlin v. Bowersox*, 318 S.W.3d 695, 698 (Mo. 2010). Under Article I, section 8, clause 17 of the United State Constitution, the United States can gain exclusive jurisdiction over land if that jurisdiction is ceded by the state. *See id.*

Missouri has consented to the federal government's purchasing land in Missouri for establishing post offices. Section 12.010, provides:

> The consent of the state of Missouri is given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this state acquired for the purpose of establishing and maintaining post offices . . . .

§ 12.010, RSMo 2000. Along with that consent, Missouri has granted and ceded jurisdiction over such lands to the United States, while reserving the right to serve process but not to prosecute crimes. *See Laughlin*, 318 S.W.3d at 699. *See also* § 12.020, RSMo 2000 ("The jurisdiction of the state of Missouri in and over all land acquired as provided in section 12.010 is granted and ceded to the United States so long as the United States owns the land; except that there is reserved to the state of Missouri, unimpaired, full authority to serve and execute all process, civil and criminal, issued under the authority of the state within the lands or the buildings.").

Under federal law, however, the federal government does not accept exclusive jurisdiction simply by purchasing land. "For lands purchased prior to February 1, 1940, the United States is presumed to have accepted jurisdiction." *Laughlin*, 318 S.W.3d 698 n. 2. However, for lands purchased after February 1, 1940, there is a "presumption against acceptance of jurisdiction by the United States." *Id.*

Under 40 U.S.C. § 3112, "[i]t is conclusively presumed that jurisdiction

has not been accepted until the Government accepts jurisdiction over land as provided in this section." 40 U.S.C. § 3112(c). That section also provides that "[i]t is not required that the Federal Government obtain exclusive jurisdiction in the United States over land or an interest in land it acquires." 40 U.S.C. § 3112(a). To accept exclusive jurisdiction, the federal government must, through a designated agent, "indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated." 40 U.S.C. § 3112(b).

Here, the record does not divulge when the Sedalia Post Office land was purchased by the federal government or whether the United States has accepted exclusive jurisdiction over it. In *Laughlin*, the record showed that "[t]he United States purchased the Neosho post office in 1933 and continuously has owned it since then." 318 S.W.3d at 698. Thus, since the land had been purchased before February 1, 1940, the federal government had exclusive jurisdiction over the land, and the State could not prosecute the defendant for offenses committed in the Neosho Post Office.

Here, by contrast, the record does not demonstrate whether the United States has accepted exclusive jurisdiction over the Sedalia Post Office land. Accordingly, the trial court should not be convicted of plain error, particularly where it is possible that the Sedalia Post Office land was purchased after

February 1, 1940, and there is a presumption against exclusive jurisdiction for such properties, unless exclusive jurisdiction has been accepted as set forth in 40 U.S.C. § 3112.[4]

"To establish plain error, [the defendant] bears the burden of demonstrating that an error so substantially affected his rights that a 'manifest injustice or miscarriage of justice has resulted therefrom.' " *See State v. Roggenbuck*, 387 S.W.3d 376, 381 (Mo. 2012). Here, Mr. Smith has not carried his burden of proving that the trial court lacked subject matter jurisdiction over Count 5. This point should be denied.

[4] According to an on-line "USPS Owned Facilities Report" the Sedalia Post Office land at "405 E 5th St" is owned by the federal government and was "occupied" on November 11, 1968. A link to the report is available at https: //about. usps. com/ who-we-are/ foia/ readroom/ ownedfacilitiesreport.htm (last accessed July 22, 2016; spaces must be removed from the link).

CONCLUSION

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

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief complies with Rule 84.06(b) and contains 8,536 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 22nd day of July, 2016, to:

AMY M. BARTHOLOW
Woodrail Centre
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, Missouri 65203
Tel.: (573) 777-9977
Fax: (573) 777-9974
amy.bartholow@mspd.mo.gov

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent