No. SC99871

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

SYLVESTER ONYEJIAKA,

Appellant.

Appeal from Circuit Court of St. Louis City, Missouri
Twenty-Second Judicial Circuit
The Honorable Bryan Hettenbach, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Sylvester Onyejiaka, Jr. (Defendant) appeals from a St. Louis City Circuit Court judgment convicting him of one count of the class D felony of possession of a controlled substance (Count I) and one count of the class E felony of unlawful use of a weapon (Count II). (LF Doc. 10). Count I charged that Defendant knowingly possessed cocaine base, knowing of its presence and nature. (LF Doc. 3). Count II charged that Defendant "knowingly possessed a handgun, a firearm, while also possessing cocaine base, knowing of its presence and nature." (LF Doc. 3). In this appeal, Defendant argues that his conviction for both counts violates the Double Jeopardy Clause.

On January 28, 2019, police patrolling the Walnut Park West neighborhood pulled over a vehicle with a heavily tinted windshield. (Tr. 132, 134, 171, 190). Upon approach, officers observed Defendant behind the wheel and a firearm tucked between the driver's seat and the center console. (Tr. 135, 173). Defendant offered to exit the vehicle, where officers handcuffed him for their safety. (Tr. 135-36, 174). Defendant told the officers that there was nothing in the vehicle except for the gun and gave them permission to search it. (Tr. 136, 174-75). In the center console of the car, officers found a cellophane wrapper containing an "off-white chunk" which they believed to be an illegal narcotic. (Tr. 139-40, 142, 176). Defendant was arrested and given the Miranda warnings, and he then identified the substance as "mo," which is a mixture of marijuana and crack cocaine. (Tr. 142-144, 177, 192).

The jury found Defendant guilty on both counts. (LF Doc. 10). The trial court sentenced Defendant to concurrent terms of three years in the Department of Corrections, suspended execution of the sentences, and placed Defendant on probation for two years. (LF Doc. 10).

This Court granted transfer after opinion by the Court of Appeals.

ARGUMENT

The trial court did not plainly err in entering a judgment of conviction on Counts I and II because the defendant's conviction for both counts did not violate the Double Jeopardy Clause, in that the legislature intended to impose cumulative punishments for violation of the separate, distinct offenses of possession of a controlled substance and unlawful use of a weapon.

A. Standard of Review

Defendant concedes that he did not properly raise a Double Jeopardy objection at trial or include such a claim in his motion for new trial. (App. Br. p.11). He requests plain error review.

"Plain error review is discretionary, and this Court will not review a claim for plain error unless the claimed error 'facially establishes substantial grounds for believing that manifest injustice or miscarriage of justice has resulted.' " *State v. Brandolese*, 601 S.W.3d 519, 526 (Mo. banc 2020). Not all prejudicial error is plain error, however. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009). "Plain error is evident, obvious, and clear error." *State v. Myles*, 479 S.W.3d 649, 655 (Mo. App. E.D. 2015). If plain error is found, the Court may exercise its discretion to move to the second step and "determine whether the claimed error actually resulted in manifest injustice or a miscarriage of justice." *Id.*

This Court has held that "because the right to be free from double jeopardy is a constitutional right that goes to the very power of the State to bring the defendant into court to answer the charge brought against him . . . a double jeopardy allegation determinable from the face of the record is entitled to plain error review on appeal." *State v. Liberty*, 370 S.W.3d 537, 546 (Mo. banc 2012) (internal quotations omitted). Under this standard, Defendant "must prove the error so substantially affected his rights that manifest injustice or miscarriage of justice has resulted therefrom." *Id.* (internal quotations omitted).

B. Analysis

Entering judgment of convictions for both Counts I and II did not violate double jeopardy because the legislature clearly intended separate, cumulative punishments for the separate offenses of possession of a controlled substance and unlawful use of a weapon.

1. The double jeopardy protection against cumulative punishments is a matter of legislative intent.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[1] *State v. Hardin*, 429 S.W.3d 417, 421 (Mo. banc 2014) (quoting U.S. CONST. amend. V). In addition to protecting against multiple prosecutions for the same offense after acquittal or conviction, the United States Supreme Court has held that the Double Jeopardy Clause also protects against "multiple punishments for the same offense." *Ohio v. Johnson*, 467 U.S. 493, 468 (1984).

These protections are distinct. *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992). Unlike the protection against successive prosecutions, the protection against cumulative punishments "is designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature." *Id.* (quoting *Johnson*, 467 U.S. 493 (1984)). "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Thus, to determine what punishments are "constitutionally permissible," the question this Court must answer is "what punishment the Legislative Branch intended to be imposed." *Id.* (quoting *Albernaz v. United States*, 450 U.S. 333, 344 (1981)).

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[1] "The double jeopardy clause of the Missouri Constitution prevents retrial only after an acquittal." *Mallow v. State*, 439 S.W.3d 764, 771 (Mo. banc 2014) (citing MO. CONST. art. I, sec. 19).

In *Blockburger v. United States*, 284 U.S. 299 (1932), the Court articulated a test for determining whether two statutes proscribe the "same" offense. *Hunter*, 459 U.S. at 366. Under the *Blockburger* test, the question is whether "each provision requires proof of a fact which the other does not." *Id.* (quoting *Blockburger*). Thus, if each offense contains an element not present in the other offense, the statutes do not proscribe the "same offense." *Id.* at 367.

The *Blockburger* test, however, proceeds from the assumption that the legislature "*ordinarily* does not intend to punish the same offense under two different statutes." *Id.* (quoting *Whalen v. United States*, 445 U.S. 684, 691-92 (1980)). It is a "rule of statutory construction," not a constitutional rule, and as such, "should not be controlling where, for example, there is a clear indication of contrary legislative intent." *Id.* at 367 (quoting *Albernaz*, 450 U.S. at 340). *Hunter* recognized that "simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes." *Id.* at 368. Rather, the Court admonished that the *Blockburger* test should not be used to "negate clearly expressed legislative intent" as to the scope of punishments. *Id.* Where the legislature "specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." *Id.* at 368-69.

Thus, before applying the *Blockburger* test, the Court should first consider whether the legislature clearly intended to impose cumulative punishments for the offenses at issue. *See id.*; *see also McTush*, 827 S.W.2d at 187 (in determining whether the legislature intended to provide cumulative sentences for the same conduct, the Court must first "examine the statutes under which appellant was convicted"). To determine and give effect to legislative intent, appellate courts consider the words "in their plain and ordinary meaning." *Lewis v. Gibbons*, 80 S.W.3d 461, 465 (Mo. banc 2002). "The construction of statutes is not to be hyper-technical, but instead is to be 'reasonable and logical and [to] give meaning to the statutes." *Id.* Courts should "examine the words used in the statute, the context in which the words are used, and the problem the legislature sought to remedy by the statute's enactment." *Soto v. State*, 226 S.W.3d 164, 166 (Mo. banc 2007).

2. Sections 579.015 and 571.030 manifest a clear legislative intent to impose cumulative punishments for the offenses they create.

Defendant was charged in Count I with possession of a controlled substance under section 579.015, RSMo 2016, which requires proof that the defendant "knowingly possesses a controlled substance[.]" § 579.015.1, RSMo

2016. Possession of a controlled substance except 35 grams or less of marijuana is a class D felony. § 579.015.2.

Count II charged that Defendant committed unlawful use of a weapon in violation of section 571.030. That statute provides that a person commits "the offense of unlawful use of weapons . . . if he or she knowingly" commits one of eleven enumerated acts, including:

(1) Carries a concealed firearm or other weapon capable of lethal use into a prohibited location;

(2) Sets a spring gun;

(3) Shoots a firearm into a "dwelling house," train, boat, aircraft, motor vehicle, or building used for the assembling of people;

(4) Exhibits a weapon capable of lethal use in an angry or threatening manner in the presence of at least one other person;

(5) Has a firearm on his person while intoxicated and uses the firearm in a negligent manner or discharges the firearm;

(6) Shoots a firearm within one hundred yards of an occupied school, courthouse, or church building;

(7) Shoots a firearm along or across a public highway or into an outbuilding;

(8) Carries a firearm into a church, election precinct on an election day, or a government-owned building;

(9) Shoots a firearm at or from a motor vehicle, shoots a firearm at any person, or at any other motor vehicle, or at any building or habitable structure;

(10) Carries a firearm into a school, onto a school bus, or onto the premises used for a school-sanctioned function;

(11) "Possesses a firearm while also knowingly in possession of a controlled substance that is sufficient for a felony violation of section 579.015."

§ 571.030.1(1)-(11), RSMo 2016. Section 571.030 provides that unlawful use of a weapon may be classified as a different level of offense depending on which subdivision of the statute was violated. Here, the State specifically charged that Defendant committed unlawful use of a weapon by knowingly possessing a firearm while also knowingly possessing cocaine base, which is prohibited by section 571.030.1(11). At the time of the offense, violation of that subdivision of the statute was a class E felony. § 571.030.8(1).

Defendant argues that sections 579.015 and 571.030 do not "specifically authorize cumulative punishments," and instead are "silent" on that issue, thus requiring application of Missouri's general intent statute, section 556.041. (App. Sub. Br. 18, 21).

It is true that sections 579.015 and 571.030 do not expressly discuss multiple punishments in the same manner as, for example, the armed criminal action statute, which Defendant cites in comparison.[2] (App. Sub. Br. 19). But, as the United States Supreme Court made clear in *Hunter*, the *Blockburger* "rule of statutory construction" prohibiting cumulative punishments applies only "in the absence of a clear indication of contrary legislative intent" and does not require courts to "negate clearly expressed legislative intent." *Hunter*, 459 U.S. at 366, 368. The question, then, is whether the Missouri legislature "clearly expressed" an intent to punish these offenses separately.

It is axiomatic that the legislature need not use "certain magic words" to express its intent. *See Bachtel v. Miller Cnty. Nursing Home Dist.*, 110 S.W.3d 799, 804 (Mo. banc 2003) (holding that, while waiver of sovereign immunity must be "express rather than implied," the legislature may express that intent through language other than to "specifically state that sovereign immunity is waived"). When the plain language of sections 579.015 and 571.030 is considered with the context of the statutes and the problems they were

[2] This is logical because in every case where armed criminal action is charged, there must be a predicate felony offense. It thus makes sense for the legislature to include language stating that punishment for armed criminal action will be additional to the punishment for the related offense. *See* § 571.015. Conversely, unlawful use of a weapon can be committed in a variety of ways, most of which *do not require* a predicate offense. Given the fact that unlawful use of a weapon often does *not* involve a related offense, the legislature may have seen no need to specify that punishment for unlawful use of a weapon is intended to be cumulative of another offense.

designed to solve, it becomes clear that the legislature intended to punish these offenses cumulatively.

First, the plain language of these statutes shows that they were designed to prohibit and punish two different kinds of conduct. Section 579.015 is directed at drug-related conduct: specifically, possessing controlled substances. Conversely, section 571.030 concerns weapons-related conduct, whether that conduct is carrying a weapon into a prohibited area, brandishing the weapon in a threatening manner, shooting a firearm under prohibited circumstances, or possessing a firearm while also possessing a controlled substance. These statutes "protect against separate and distinct evils": (1) the harms of drug use and possession on one hand; and (2) the dangers created by misuse of weapons on the other. *See State v. Walker*, 352 S.W.3d 385, 392 (Mo. App. E.D. 2011) (noting that separate statutes criminalizing forcible rape and statutory rape protect against separate evils in support of holding that legislature intended cumulative punishment for those offenses); *Treta v. State*, 559 S.W.3d 406, 412 (Mo. App. W.D. 2018) (following the rationale in *Walker*).[3]

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[3] *Walker* and *Treta* ultimately analyzed the question of cumulative punishments under section 556.041, but both cases cited the legislative history of the statutes at issue and the "evils" they were intended to rectify as supporting the conclusion that the legislature intended cumulative punishments for the offenses at issue.

The legislature's intent that these offenses be separate and distinct is underscored by the fact that they are codified not only in different statutes, but in entirely different chapters of the criminal code. Possession of a controlled substance is codified in chapter 579, which is titled "Controlled Substance Offenses," while unlawful use of a weapon is located in chapter 571, which is titled "Weapons Offenses." §§ 579.015; 571.030.

This fact becomes even more significant when considering the history of the prohibition on possessing a firearm while also possessing a controlled substance. The legislature added this subdivision to section 571.030.1 in 2014. § 571.030.1(11), RSMo 2016.[4] It is evident from the plain language of section 571.030.1(11) that the legislature was aware that a separate offense already penalized possession of a controlled substance when it enacted the new weapons prohibition. Section 571.030 expressly recognizes the existence of the controlled substances offense: it criminalizes possessing a firearm "while also" knowingly possessing a controlled substance "that is sufficient for a felony violation of section 579.015." § 571.030.1(11).

Thus, the legislature clearly knew there was already an offense penalizing possession of a controlled substance. If the legislature had intended

[4] Although this revision became effective in 2014, it was not published in the Missouri Revised Statutes until 2016.

its new prohibition on possessing a firearm while also possessing a controlled substance to be treated as the same offense as possessing the substance itself, the legislature could easily have added this language to section 579.015 and specified the effect of the firearm possession on the offense classification under that statute.[5]

But the legislature did not do so. Instead, it codified its new prohibition as the eleventh way to commit unlawful use of a weapon under section 571.030. The legislature's decision to prohibit this conduct as part of a weapons offense, rather than as part of a drug offense, while nonetheless expressly recognizing the existence of the drug offense, shows clear intent that these two offenses be treated as separate and distinct. That intent is further underscored by the legislature's use of the word "also" when it enacted section 571.030.1(11). Webster's dictionary defines "also" as "[i]n addition," "as well," "besides," and "too." Webster's Third New International Dictionary (1986). By expressly defining unlawful use of a weapon as knowingly possessing a firearm "*while also*" knowingly possessing a controlled substance sufficient for a felony violation of section 579.015, the legislature manifested an intent to punish the

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[5] Indeed, section 579.015 already provides that possessing a controlled substance constitutes differing levels of offenses based on the facts proven, including the type of substance, the quantity possessed, and prior offense history. § 579.015.2-.4.

possession of the firearm separately and cumulatively—i.e., in addition—to the possession of the controlled substance.

Finally, the different classification for each offense supports the conclusion that the legislature intended for them to be punished separately and cumulatively. At the time of the alleged offense, possession of a controlled substance constituted a class D felony[6] and was punishable by up to a seven-year term of imprisonment. §§ 579.015.2; 558.011.1(4), RSMo 2016. Unlawful use of a weapon in violation of section 571.030.1(11) was a class E felony and was punishable by up to a four-year term of imprisonment. §§ 571.030.8(1); 558.011.1(5). Thus, when the legislature penalized the possession of a firearm while also possessing a controlled substance as a class E felony under section 579.030.1(11), it knew that possessing a controlled substance was, by itself, a class D felony. *See generally State v. Haskins*, 950 S.W.2d 613, 616 (Mo. App. S.D. 1997) ("[T]he General Assembly is presumed to be aware of existing declarations of law and the construction of existing statutes when it enacts a law on the same subject.").

Defendant's interpretation of these statutes as permitting only a single punishment would require the Court to conclude that the legislature intended

[6] Before the 2017 revision of the criminal code, the same offense constituted a Class C felony.

to subject a person possessing both a firearm *and* a controlled substance to a less serious, class E felony—and thus to a lower sentencing range—than a person who possessed the substance alone, which is a class D felony. Such a holding would essentially convert the possession of a firearm into a mitigating factor by rendering the possessor eligible for a lower range of punishment than would otherwise be available for a charge of possession of a controlled substance. This is illogical. A person who unlawfully possesses both a firearm and a controlled substance logically presents a greater danger to the public safety than a person who possesses only the controlled substance.[7] "Construction of statutes should avoid unreasonable or absurd results." *See Lewis*, 80 S.W.3d at 466.

The enactment of section 571.030.1(11) as a class E felony makes far more sense under the assumption that the legislature intended it to be an additional, cumulative punishment to that imposed under section 579.015. Under that construction, any person who unlawfully possessed a controlled substance would be criminally liable for a class D felony under section

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[7] Indeed, courts have recognized that injury or death is a "foreseeable part of an illegal drug transaction because guns are commonly carried and used by participants in drug deals." *See State v. Burrage*, 465 S.W.3d 77, 81 (Mo. App. E.D. 2015). Likewise, possession of a firearm may also be indicative of a defendant's intent to distribute the drugs he possessed, as "[a] gun is considered a tool of the trade for individuals dealing in drugs[.]" *U.S. v. Williams*, 181 F.3d 945, 951, n.8 (8th Cir. 1999).

579.015.2. Persons who *also* possessed a firearm, and therefore posed a greater danger to the community, could additionally be charged under section 571.030.1(11) and subjected to an additional sentence for a class E felony. A person who engaged in more harmful conduct (by possessing both a firearm and a controlled substance) would thus be subject to a greater possible range of punishment than someone who possessed only the controlled substance. This is the logical interpretation of these statutes, as the alternative would effectively reward persons who possess firearms as well as controlled substances by granting them a lower sentencing range than they otherwise would have been exposed to for possessing the substance alone.

In sum, the legislature's intent to punish violations of section 579.015 and 571.030.1(11) separately and cumulatively is clear from the plain language of the statutes, the context of the offenses and the history of section 571.030.1(11)'s enactment, the separate harms the offenses are intended to address, and the classifications assigned to these offenses.[8] "Legislatures, not

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[8] Interpreting similar state statutes, other state supreme courts have found clear legislative intent to impose cumulative punishments, even in the absence of an express authorization. *See, e.g.*, *Rowbottom v. State*, 13 S.W.3d 904, 908 (Ark. 2000) (holding that the legislature intended cumulative punishments for possession with intent to deliver a controlled substance and "simultaneous possession of drugs and firearms" largely because the simultaneous possession statute "specifically refers to committing a violation of" possession with intent to deliver, and the legislature "thereby made it clear … that it wishes to assess an additional penalty for simultaneously possessing controlled substances and

courts, prescribe the scope of punishments." *Hunter*, 459 U.S. at 368. "The question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed." *Id.* at 368 (quoting *Albernaz*, 450 U.S. at 344). Where there is a "clear indication" of "legislative intent" to impose cumulative punishments, "imposition of such sentences does not violate the Constitution," regardless of whether the offenses may be construed as proscribing the same conduct. *Id.*; *see also State v. Blackman*, 968 S.W.2d 138, 140 (Mo. banc 1998) ("If legislative intent is clear, then the elements of each crime under the *Blockburger* test need not be examined."). Because the legislature clearly intended cumulative punishments for violations of section 579.015 and 571.030.1, this Court should find that charging and prosecuting Defendant with both offenses in a single

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a firearm"); *State v. Perez*, 563 N.W.2d 625 (Iowa 1997) (holding that sentences for assault and "assault while participating in a felony" did not violate double jeopardy protections because the statute criminalizing "assault while participating in a felony" "[o]n its face" "contemplates punishment for two offenses—the assault resulting in injury *as well as* the predicate felony"); *State v. Gardner*, 340 S.E.2d 701, 712-14 (N.C. 1986) (punishment for both "breaking or entering and felony larceny based upon that breaking or entering" did not constitute double jeopardy because the defendant's conduct was "violative of two separate and distinct social norms," the history and placement of the two offenses in the General Statutes indicated a legislative intent that they be "separate and distinct," the crimes had judicially been treated as separate and distinct, and treating the predicate offense, which could include "Class C, D, and E felonies" as lesser-included offenses of the "Class H felony of larceny" would be "an absurd result").

indictment did not violate the Double Jeopardy Clause, and it should reverse the trial court's judgment dismissing Count I.

3. Application of section 556.041 also reveals a legislative intent to punish unlawful use of a weapon and possession of a controlled substance cumulatively.

"In the absence of an offense-specific indication of legislative intent, the legislature's general intent regarding cumulative punishments is expressed in section 556.041[.]" *State v. Hardin*, 429 S.W.3d 417, 422 (Mo. banc 2014). Section 556.041, RSMo 2016 provides, "When the same conduct of a person may establish the commission of more than one offense he or she may be prosecuted for each such offense" except in four circumstances, including when "[o]ne offense is included in the other, as defined in section 556.046[.]" § 556.041.1(1). Section 556.046.1(1), RSMo 2016, in turn, defines an included offense as one "established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]"[9]

Under the "elements test" of section 556.046.1(1), the court determines the elements of the offenses from the statutory provisions and compares them. *Hardin*, 429 S.W.3d at 422. "If each offense requires proof of a fact that the

[9] This Court noted in *Hardin* that section 556.041.1(1) "closely tracks the language of the included offense definition developed in *Blockburger*, and has previously recognized this provision to be a "codification" of the *Blockburger* test. *Hardin*, 429 S.W.3d at 424 n.6; *Peiffer v. State*, 88 S.W.3d 439, 443 (Mo. banc 2002).

other does not, then the offenses are not lesser included offenses, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Id.* (quoting *McTush*, 827 S.W.2d at 188). "An offense is a lesser included offense if it is impossible to commit the greater without necessarily committing the lesser." *Id.* (quoting *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002)).

Neither possession of a controlled substance nor unlawful use of a weapon is "included" in the other offense. Unlawful use of a weapon requires proof that the defendant "knowingly" committed one of eleven possible weapons-related acts, while possession of a controlled substance does not require proof of any weapons-related conduct. Meanwhile, possession of a controlled substance requires proof that the defendant knowingly possessed a controlled substance, while unlawful use of a weapon may be proven without demonstrating possession of a controlled substance. "Each offense requires proof of an element the other does not." *See Hardin*, 429 S.W.3d at 423 (discussing aggravated stalking and violation of a protection order).

Defendant argues, however, that "a conviction for unlawful use of weapons – section 11 – possessing a firearm while also in possession of a controlled substance, cannot be had without proving the element required in possession of a controlled substance," and therefore he could not be sentenced for both of those offenses. (App. Sub. Br. 13). Defendant's argument necessarily focuses on how the unlawful use of a weapon offense was charged instead of on the statutory elements in section 570.030. This argument misapplies the elements test codified in section 556.041, which concerns the "elements of the statutes defining each offense," not the manner in which the purportedly greater offense was charged. *Hardin*, 429 S.W.3d at 424.

The Court's decision in *Hardin* demonstrates the importance of this distinction when one of the charged offenses may be committed in numerous ways, as unlawful use of a weapon can. In *Hardin*, the defendant alleged that his convictions for aggravated stalking and violating a protective order violated double jeopardy because the convictions were based on the same conduct. *Id.* at 421. After observing that the statutes criminalizing aggravated stalking and violation of an order of protection were silent on legislative intent to impose cumulative punishment, the Court considered the defendant's argument that one offense was "included" in the other under section 556.046's analysis.

The first offense, aggravated stalking, required proof that the defendant committed the offense of stalking[10] and "his course of conduct include[d] one of five aggravators," which were enumerated by statute. *Id.* at 422-23. One of the five "aggravators" required that "one of the acts constituting the course of

[10] The Court noted that a person commits the offense of "stalking" if he "purposely, through his or her course of conduct, harasses or follows with the intent of harassing another person." *Id.* at 422.

conduct is in violation of an order of protection and the person has received actual notice of such order." *Id.* at 423 (quoting § 565.225.3). None of the other four aggravators required violation of a protective order. *Id.*

The second offense, violation of an order of protection, required proof that the defendant committed an act of abuse in violation of a protective order entered against him. *Id.* (quoting § 455.085.2).

The Court held that a "straightforward application" of the included-offense definition in section 556.046.1 demonstrated that "[e]ach offense require[d] proof of an element the other d[id] not": aggravated stalking required proof of a course of conduct composed of two or more acts, which was not required in a protective order violation, while a protective-order violation required proof that the act violated an existing protection order, "while aggravated stalking may be proven without demonstrating a protective order violation." *Id.*

The Court expressly rejected the defendant's argument that "it is impossible to commit aggravated stalking without violating the order of protection," and instead observed that it "*is* possible to commit aggravated stalking without violating an order of protection: a defendant may commit aggravated stalking by making a credible threat, for example, or by violating a condition of his probation or parole." *Id.* The Court explained that the fallacy of the defendant's position rested in his assumption that "whether the offense of violating a protective order is included in the offense of aggravated stalking depends on *how the latter offense is indicted, proved, or submitted to the jury*." *Id.* (emphasis added). The Court stated that this "indictment-based application" of the included-offense definition had been "expressly rejected" by the Court. *Id.* (citing *State v. Smith*, 592 S.W.2d 165, 166 (Mo. banc 1979)).

The Court then noted its "long-running understanding of lesser-included offenses" as requiring a comparison of the greater offense statute with the elements of the included offense, not a comparison between "the Charge or averment of the greater offense with the legal and factual elements of the lesser offense." *Id.* at 424 (quoting *State v. Baker*, 636 S.W.2d 902, 904 (Mo. banc 1982), and *State v. Smith*, 592 S.W.2d 165, 166 (Mo. banc 1979)). The Court thus held that, although "aggravated stalking *may* be established by proof of a protective order violation," it "may also be established by proof of other facts," and thus "[a] protective order violation is not a fact proof of which is required to establish commission of aggravated stalking" such that it could be an included offense under section 556.046.1. *Id.* The Court therefore concluded that the defendant's convictions for both offenses did not violate double jeopardy. *Id.*

And in *State v. Collins*, 648 S.W.3d 711 (Mo. banc 2022), the Court followed *Hardin* in rejecting a double-jeopardy challenge to convictions for harassment in the second degree and tampering with a judicial officer. As was true of the aggravated-stalking offense in *Hardin*, tampering with a judicial officer may be committed in multiple ways, including by engaging in conduct "calculated to harass or alarm" a judicial officer or that person's family with a purpose to "harass, intimidate or influence a judicial officer." *Id.* at 720. The other charged offense, second-degree harassment, is committed when someone, "without good cause, engages in any act with the purpose to cause emotional distress to another person." *Id.* at 719-20. The defendant argued that it was impossible to "harass or alarm" someone without causing them emotional distress, and that the harassment offense was consequently included in the tampering offense. *Id.* at 720. The Court recognized that *Hardin* addressed the same issue, and concluded that, "just as in *Hardin*, tampering with a judicial officer *may* be established with proof of a purpose to harass, but it also may be established with proof of" bribing the officer or one of the other, alternative methods described in the statute. *Id.* at 721. The Court thus once again expressly rejected an "indictment-based application" of the elements test.[11] *Id.* at 720-21.

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[11] Indeed, *Collins* expressly overruled *State v. McTush*, 827 S.W.2d 184 (Mo. banc 1992), and *Peiffer v. State*, 88 S.W.3d 439 (Mo. banc 2002), to the extent these cases "embrace an indictment-based approach." *Collins*, 648 S.W.3d at 720 n.6.

a. **Hardin** *and* **Collins** *were correctly decided.*

Defendant urges this Court to overrule *Hardin* and *Collins*; he contends that both cases "misapply the lesser included offense test." (App. Sub. Br. 32.). Defendant is incorrect, as these recent cases are solidly founded in double-jeopardy principles and Missouri case law.

Defendant first cites *Whalen v. United States*, 445 U.S. 684 (1980), as supporting his interpretation of the elements test. But *Whalen* was decided on an interpretation of federal law, not Missouri law, and is thus inapposite here.

The Court in *Whalen* considered whether sentences under two laws "enacted by Congress for the governance of the District of Columbia" criminalizing "rape" and "killing a human being in the course of any of six specified felonies, including rape," violated the Double Jeopardy Clause by imposing multiple punishments for the same offense. *Id.* at 685-86. The Court ultimately concluded that they did because "[a] conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape,"[12] notwithstanding the federal government's argument that rape was

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[12] The majority in *Whalen* rejected the dissent's allegation that it had applied the *Blockburger* rule "to the facts alleged in a particular indictment," but insisted instead that it has simply concluded that "Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of rape." *Id.* at 694 n.8. This footnote first indicates that, like this Court in *Hardin*, the U.S. Supreme Court seemingly perceives a factual or indictment-based application of the elements test as erroneous; otherwise, the

only one of six different ways to commit "felony murder" offense, and thus was not the "same" offense under the *Blockburger* test. *Id.* at 693-94.

But, crucially, before reaching this conclusion, the Court first considered its "power" to interpret the federal offenses at issue in the case. *Id.* at 687-88. The Court first noted its general "practice" of deferring to the District of Columbia on matters of "exclusively local concern," such as the statutes at issue in this case, in an effort to treat those courts "in a manner similar to the way in which [the Court] treat[s] decisions of the highest court of a State on questions of state law." *Id.* at 687. The Court continued, however, that the

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majority would presumably not have disclaimed such analysis in its opinion. Second, the majority's analysis includes a logical fallacy, which is artfully articulated by the dissent in *Whalen*:

> Technically, § 22–2401 defines only one offense, murder in the first degree, which can be committed in any number of ways. Even if the inquiry is limited to the "sub-offense" of felony murder, § 22–2401 indicates that a person may be convicted if he kills purposely in the course of committing any felony or kills even accidentally in the course of committing one of six specified felonies. Only by limiting the inquiry to a killing committed in the course of a rape, a feat that cannot be accomplished without reference to the facts alleged in this particular case, can the Court conclude that the predicate offense is necessarily included in the compound offense under *Blockburger*. Because this Court has never before had to apply the *Blockburger* test to compound and predicate offenses, see n. 5, supra, and accompanying text, there is simply no precedent for parsing a single statutory provision in this fashion.

Id. at 711 n.6 (Rehnquist, J., dissenting).

deference generally accorded to District of Columbia courts on matters of local law "is a matter of judicial policy, not a matter of judicial power." *Id.* "Acts of Congress affecting only the District, like other federal laws, certainly come within this Court's Art. III jurisdiction[.]" *Id.* The Court thus concluded that it was "not *prevented* from reviewing the decisions of the District of Columbia Court of Appeals interpreting those Acts in the same jurisdictional sense that *we are barred from reviewing a state court's interpretation of a state statute.*" *Id.* at 687-88 (emphasis added).

Whalen, then, is a case in which the U.S. Supreme Court interpreted federal statutes and thereby concluded that those statutes constituted the same offense under the federal codification of the *Blockburger* test. *See id.* at 691. As *Whalen* expressly recognizes, however, the U.S. Supreme Court is jurisdictionally "barred" from reviewing a "state court's interpretation of a state statute." *Id.* at 687-88. The interpretation of Missouri statutes, including those at issue in this case, and those at issue in *Hardin* and in *Collins*, is exclusively the province of Missouri courts. Thus, *Whalen*'s interpretation of the federal statutes considered there is not applicable in this case, nor does it suggest that *Hardin* and *Collins* were wrongly decided.

This Court in *Hardin* interpreted four Missouri statutes. It first considered the statutes defining the offenses charged—aggravating stalking and violation of an order of protection. *Hardin*, 429 S.W.3d at 421. The Court found that those statutes were silent as to whether cumulative punishment was intended, so the Court then looked to section 556.041, which codifies "the legislature's general intent regarding cumulative punishments," and, by extension, to section 556.046, which defines an included offense. *Id.* at 421-22. After considering the elements of each of the statutory offenses charged, the Court considered and rejected the appellant's argument that, as the purportedly greater offense was charged, it was impossible to commit without also committing the purported lesser. *Id.* at 423. The Court specifically held that "[s]ection 556.046.1(1) effectively codifies" the definition of included offenses adopted in *Smith*, which called for a comparison of "the Statute of the greater offense with the factual and legal elements of the lesser offense" rather than a comparison of the "Charge or averment of the greater offense" with the elements of the lesser. *Id.* at 424.

Thus, *Hardin*'s holding rests on this Court's interpretation of sections 556.041 and 556.046 as adopting a statute-based analysis of whether one offense is included in another. This is an interpretation of state law by the state's highest court, and is not subject to review by the U.S. Supreme Court, as *Whalen* expressly recognized. And *Hardin*'s interpretation of these Missouri statutes was reaffirmed in *Collins*. This Court should once again affirm those cases here.

Defendant, however, suggests that *Hardin* effectively misinterpreted *Smith* and the cases cited therein. He is incorrect.

In rejecting an "indictment-based application" of the elements test in section 556.046, *Hardin* quoted *State v. Smith*, 429 S.W.3d 417, 166 (Mo. banc 1979), as holding that the elements test required courts to "compare the Statute of the greater offense with the factual and legal elements of the lesser offense," not "compare the Charge or averment of the greater offense with the legal and factual elements of the lesser offense." *Hardin*, 429 S.W.3d at 424.

Smith, in turn, discussed the holding in *State v. Amsden*, 299 S.W.2d 498, 504 (Mo. 1957). The *Smith* Court recognized that some language in *Amsden* had "caused some confusion" in determining whether one offense is included in another because it "speaks of both 'averment of the indictment,' and 'legal and factual elements.'" *Smith*, 592 S.W.2d at 166 (quoting *Amsden*, 299 S.W.2d at 504). *Smith* observed that, based on the language in *Amsden*, there were two possible "approaches" to resolve the issue presented in *Smith*, which was whether "burglary in the second degree of a dwelling house requires an instruction on the lesser offense of trespass." *Id.* The first approach was to "compare the Statute of the greater offense with the factual and legal elements of the lesser offense." *Id.* The alternative approach was to "compare the Charge or averment of the greater offense with the legal and factual elements of the lesser offense." *Id.* *Smith* squarely resolved this question by adopting the first approach, which it termed "the Statutory element test." *Id.* Turning to the issue before it, the *Smith* Court stated, "Accordingly, the essential question in this case is: does s 560.070, RSMo 1969 (burglary in the second degree) include All of the statutory elements of s 560.447, RSMo Supp. 1975 (trespass)?" *Id.*

Smith's pointed reference to both of the *statutes* defining the offenses at issue leaves no doubt that the Court adopted an elements test that looks to the *statutory* elements of both offenses to determine if one is included in the other and thereby rejected the alternative approach, which would instead look to the way in which the greater offense was charged. *See id.* This is exactly the proposition for which *Smith* was cited in *Hardin*. 429 S.W.3d at 424.

Defendant emphasizes *Smith*'s citation to *State v. Friedman*, 398 S.W.2d 37 (Mo. App. 1965), to bolster his argument that *Hardin* and *Collins* "misapply" *Smith*, which he claims "came from" *Friedman*. (App. Sub. Br. 32). This argument places undue weight on *Friedman*.

It is true that *Smith* favorably cited *Friedman* as having "properly interpreted *Amsden* to hold 'that to be a necessarily included lesser offense it is essential that the greater offense include All Of the legal and factual elements of the lesser." *Smith*, 592 S.W.2d at 166 (quoting *Friedman*, 398 S.W.2d at 40). *Smith*'s citation to *Friedman* was thus limited to recognizing that *Amsden* adopted "the Statutory element test." *Id.*

Defendant, however, would have this Court read *Smith* as expansively approving of the entirety of *Friedman*, which considered whether a misdemeanor offense defined in section 561.460 was an included offense of section 561.450, which "specifies and prohibits various methods of cheating and defrauding." *Friedman*, 398 S.W.2d at 38-39. The Court of Appeals determined that it was concerned with only one of the methods of "cheating and defrauding" identified in the statute, citing *State v. Scott*, 230 S.W.2d 764 (Mo. 1950). The Court of Appeals then "restated and restricted" the appellant's inquiry to the issue of "whether the offense under section 561.460 of giving a check on a bank in which the drawer knows he has not sufficient funds or credit for the payment of such check, a misdemeanor, is a lesser included offense of that part of Section 561.450 which makes it a felony for a drawer to give a check on a bank in which he knows he has no funds." *Id.* at 39. After so limiting its consideration, the Court of Appeals determined that the misdemeanor was not an included offense of the felony charged. *Id.* at 40.

Smith did not refer to or cite with approval this analysis from *Friedman*; its only citation to *Friedman* was to its interpretation of *Amsden* as adopting "the Statutory element test." *See Smith*, 592 S.W.2d at 166. *Friedman* thus cannot bear the weight Defendant places on it. And, to the extent *Friedman* looked to the manner in which the felony offense was charged in that case,[13] it is inconsistent with *Hardin* and *Collins*, and should no longer be followed. *Collins*, 648 S.W.3d at 720 n.6.

Moreover, *Friedman*'s reference to *State v. Scott* for the proposition that the court was only concerned with "one" of the "various methods" of committing the purportedly greater offense exposes the legal error at the root of the Court of Appeals' analysis. *Friedman*, 398 S.W.2d at 39. *Scott* did not consider whether one offense was included in another. *Scott*, 230 S.W.2d 764. The question at issue in *Scott* was whether the evidence presented in that case was sufficient to sustain a conviction for "obtaining money, with intent to cheat and defraud, by giving a check drawn upon a bank in which he knew he had no funds, in violation of Rev.Stat.Mo.1939, Sec.4964[.]" *Id.* at 766-67. As this Court held in *State v. Zetina-Torres*, for purposes of a sufficiency claim, Missouri courts look to "how the crime was charged." 482 S.W.3d 801, 809 (Mo. banc 2016). Conversely, when considering whether one offense is included in

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[13] Although *Friedman* did not specifically state that it was referring to the charging document to determine which of the "various methods of cheating and defrauding" it would consider in its included-offense analysis, the court observed that the defendant "was charged with having, with intent to defraud, given a check to [a third party], drawn upon a bank in which defendant knew he had no funds." *Friedman*, 398 S.W.2d at 38. The court later indicated that the "part of section 561.450" at issue in the included-offense analysis was the part that "makes it a felony for a drawer to give a check on a bank in which he knows he has no funds." *Id.* at 39.

another, *Smith*, and, subsequently, *Hardin* and *Collins*, expressly eschew an indictment-based approach, and instead bid the courts to compare the statutory elements of the offenses at issue. *Friedman*'s—and Defendant's—reliance on *Scott*, a sufficiency case, is wholly misplaced as a result.

Defendant also cites to *State v. Sanders*, 522 S.W.3d 212 (Mo. banc 2017), for the proposition that, for one offense to be included in another, "*it must be based on the criminal conduct that is alleged in the information or indictment as to the greater/charged offense*." (App. Sub. Br. p.24). But *Sanders* is not inconsistent with *Hardin* and *Collins*. Rather, it concerns an entirely different issue: whether a proffered instruction submits the same "conduct" charged in the information or indictment.

In *Sanders*, the State charged the defendant with murder in the second degree for "knowingly causing [the victim's] death by 'kicking her and strangling her.'" *Sanders*, 522 S.W.3d at 214. The jury was instructed consistent with this charge, as well as on voluntary manslaughter. *Id.* at 215. The defense also proffered an instruction for involuntary manslaughter, which "would have required the jury to determine whether [the defendant] recklessly caused [the victim's] death by kicking her," but the trial court refused the instruction, which was the subject of the defendant's appeal. *Id.* at 215.

After concluding that involuntary manslaughter is an offense "nested" within the greater offense of second-degree murder, which would generally require a trial court to "give a timely and properly requested instruction for involuntary manslaughter," the Court turned to the instruction actually requested by the defendant. *Id.* at 216-17. The Court concluded that the proffered instruction was "improperly worded" because it did not instruct on "the offense charged" in the indictment, which, in *Sanders*, was knowingly causing the victim's death by "kicking her and strangling her." *Id.* at 217-18. The proffered instruction, conversely, required the jury to find that the defendant recklessly caused the victim's death "by 'kicking her,'" and thereby "impermissibly modified *the criminal conduct* underlying the charged offense by deviating from 'the manner in which *the greater* crime is charged in the accusatory pleading.'" *Id.* at 218 (emphasis added).

The primary holding in *Sanders* does not concern the application of the elements test to determine whether, legally, one statute is included in another—indeed, the Court observed that "there is no dispute that involuntary manslaughter is a nested lesser included offense of second degree murder." *Id.* Rather, the central issue in *Sanders* concerned the *factual* offense charged: in other words, the manner in which the murder was committed, or the specific conduct the defendant allegedly engaged in to bring about the murder. *Sanders* holds that, in order to be convicted of an included offense under section 556.046, not only must the offense consist of "legal elements" that are necessary for the commission of the greater offense, but it must *also* be factually "based on the criminal conduct" that is alleged as the factual basis for the charged offense. *Id.* at 217-18.

The "manner" in which an offense is committed, or the "criminal conduct" charged to constitute the offense, are not "legal elements" of the offense. *See generally State v. Weyant*, 598 S.W.3d 675, 680-81 (Mo. App. W.D. 2020) (discussing case law holding that jurors need not be unanimous as to the "means" a defendant committed an offense as long as it unanimously agreed to the necessary elements of the crime). For example, neither "kicking" nor "strangling" are "elements" of the offenses at issue in *Sanders*: they are, instead, different methods, or types of conduct, by which someone might commit either murder or involuntary manslaughter. Because the proffered instruction in *Sanders* alleged different conduct as the basis for involuntary manslaughter—kicking—than the conduct alleged to support the second-degree murder charge—kicking and strangling—it was improper, notwithstanding the undisputed fact that, legally, involuntary manslaughter is an included offense of second-degree murder. *Id.* at 218.

Sanders's analysis of the "criminal conduct" charged as compared to a proffered included-offense instruction simply does not apply here. In this case, there is no included-offense instruction that must be based on the same "criminal conduct" as the offense charged. Rather, the only question here is one that was undisputed in *Sanders*: whether one offense (possession of a controlled substance) is included in another (unlawful use of a weapon). *Sanders* is neither inconsistent with, nor does it purport to overrule, *Hardin*, which expressly holds that, for purposes of a double-jeopardy analysis under sections 556.041 and 556.046, courts must compare the statutory elements of the offenses at issue, not the manner in which those offenses are charged. And, years after *Sanders* was decided, this Court reaffirmed *Hardin* in *Collins*, which reinforces the conclusion that *Sanders* concerns a different issue than the one addressed in *Hardin*. *Sanders* thus does not support Defendant's argument here.

Hardin and *Collins* are well-founded in logic and legal precedent in interpreting sections 556.041 and 556.046 as requiring a comparison of the statutory elements of two offenses when determining whether one is included in the other. This Court should affirm these cases, and the Missouri Court of Appeals cases that have followed them.

b.* Hardin *and* Collins *cannot be distinguished from this case.

Defendant next attempts to distinguish *Hardin* and *Collins* from the instant case because he contends that section 571.030 defines "multiple different offenses under one statute." (App. Sub. Br. 32). This argument is unavailing.

Defendant cites *State v. Couts*, 133 S.W.3d 52, 55 n.5 (Mo. banc 2004), for the proposition each subsection of section 571.030 is a "separate offense."

(App. Sub. Br. 25). In that footnote, this Court observed that in 1981, "multiple offenses pertaining to the unlawful use of a weapon were combined in section 571.030.1[.]" *Id.* But when discussing the modern section 571.030.1, this Court did not refer to individual subsections as "separate offenses"; rather, the Court referred to the "type" committed by the defendant in that case, and to the "forms of unlawful use of a weapon" included in the statute. *Id.* at 55, 56. Thus, this Court appeared to recognize that, where there were once different statutes defining different offenses "pertaining to the unlawful use of a weapon," after those offenses were "combined" in one statute, they became "types" or "forms" of the offense of unlawful use of weapon.

Defendant is correct that a number of cases have held that, applying section 556.046, different subsections of unlawful use of a weapon may be charged for the same conduct because they are "separate offenses"—that is, each subsection includes an element the other does not. (App. Sub. Br. 25-26) (citing *Yates v. State*, 158 S.W.3d 798 (Mo. App. E.D. 2005), and *State v. Haynes*, 564 S.W.3d 780 (Mo. App. E.D. 2018)). But Defendant fails to explain how this fact distinguishes the instance case from *Hardin* or *Collins*. This would be equally true of the purported greater offense considered in *Collins*, tampering with a judicial officer, which is committed

> if, with the purpose to harass, intimidate or influence a judicial officer in the performance of such officer's official duties, such person:

(1) Threatens or causes harm to such judicial officer or members of such judicial officer's family;
(2) Uses force, threats, or deception against or toward such judicial officer or members of such judicial officer's family;
(3) Offers, conveys or agrees to convey any benefit direct or indirect upon such judicial officer or such judicial officer's family;
(4) Engages in conduct reasonably calculated to harass or alarm such judicial officer or such judicial officer's family, including stalking pursuant to section 565.225 or 565.227.

Collins, 648 S.W.3d at 720. One can imagine a fact-pattern in which the same conduct would violate multiple subsections of this statute. For example, say a mob boss, with the purpose to influence a local judge, sent a letter to the judge that both threatened to harm the judge if he did not rule a certain way in cases involving the mob's interests and offered benefits to the judge for favorable rulings.

Under the elements test in section 556.046.1(1), this letter would constitute two separate offenses of judicial tampering: one for threatening to harm the judge with the purpose of influencing the judge, and one for offering a benefit to the judge with the purpose of influencing the judge. Even though both offenses are codified in the same statute and are both forms of "tampering with a judicial officer," each offense includes an element the other does not: section 575.095.1(1) requires a threat to a judicial officer, while section 575.095.1(3) requires an offer of a benefit to a judicial officer. Thus, on these facts, the State could charge, and the court could impose sentences for two counts of judicial tampering for the same conduct.

This hypothetical shows that, just as unlawful use of a weapon can be violated in multiple ways by the same conduct, so, too, can other offenses, including the offense specifically considered in *Collins*. Nonetheless, when considering whether a different offense is included within a purportedly greater offense that can be committed multiple ways, *Hardin*[14] and *Collins* both hold that the elements of the included offense must be compared with *all* of the statutory elements of the greater offense, not just the form of the offense charged on the facts of the case. There is thus no meaningful basis to distinguish section 571.030 from the aggravated stalking offense considered in *Hardin* or the judicial tampering offense considered in *Collins*.

c. Pursuant to section 556.041, Defendant's convictions and sentences do not violate the Double Jeopardy Clause.

Following *Hardin* and *Collins*, this Court should reject the "indictment-based application" of the elements test advocated by Defendant. "If a statute may be violated in multiple ways, the critical issue for double jeopardy analysis is what the statute requires; the analysis does not involve how the offense is

[14] It is not clear that the aggravated stalking statute at issue in *Hardin* would support multiple offenses because it expressly criminalizes a "course of conduct"; thus, even if the defendant's action violated several of the individually listed aggravating factors, this conduct would be part of a single "course of conduct," and thus would support only a single charge. *Hardin*, 429 S.W.3d at 422-23. But this conclusion is a function of the legislatively-determined unit of prosecution, not an application of the elements test in section 556.046.01(1): it does not contradict the analysis discussed above.

indicted, proved, or submitted to the jury." *State v. Foster*, 591 S.W.3d 518, 522 (Mo. App. W.D. 2019) (quoting *State v. Watkins*, 533 S.W.3d 838, 846 (Mo. App. S.D. 2017), and citing *Derenzy*, 89 S.W.3d at 474).

Like the offense of aggravated stalking considered in *Hardin* and the judicial-tampering offense in *Collins*, unlawful use of a weapon can be committed in a number of ways. § 571.030.1. One possible way to prove the offense of unlawful use of a weapon is to show that the defendant knowingly possessed a firearm while also knowingly possessing a controlled substance that would constitute a felony violation of section 579.015, as the State charged in this case. § 571.030.1(11). However, double-jeopardy analysis under section 556.046.1 does not consider how the offense was charged, but rather focuses exclusively on what the statute requires. *See Hardin*, 429 S.W.3d at 423-24; *Foster*, 591 S.W.3d at 522. Section 571.030.1 does not *require* that an individual possess a controlled substance to commit the offense of unlawful use of a weapon, as Defendant suggests; there are ten other ways to prove unlawful use of a weapon that do not require such possession.

Thus, while unlawful use of a weapon *may* be established by proof of possession of a controlled substance, "it may also be established by proof of other facts," just like the offenses considered in *Hardin* and *Collins*. *See Hardin*, 429 S.W.3d at 424. Possession of a controlled substance therefore is "not a fact proof of which is required to establish" unlawful use of a weapon, and it is not an included offense under section 556.046.1. *See id.*

Entering a judgment of conviction for possession of a controlled substance under Count I and unlawful use of a weapon under Count II did not violate the Double Jeopardy Clause. This point should consequently be denied.

CONCLUSION

Defendant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 10,036 words, excluding the cover, certification, and appendix, if any, as determined by Microsoft Word 2016 software, and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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