

IN THE SUPREME COURT OF MISSOURI

Case No. SC101104

STATE OF MISSOURI,

Respondent,

v.

ISIS S. JONES,

Appellant.

On Transfer from the Missouri Supreme Court
From the Missouri Court of Appeals, Eastern District
of Case No. ED112232
From the Circuit Court of the City of St. Louis, Missouri
of Case No. 2122-CR0171-01
The Honorable Katherine M. Fowler, Presiding

SUBSTITUTE REPLY BRIEF OF APPELLANT ISIS S. JONES

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ARGUMENT

The trial court committed plain error resulting in a manifest injustice prejudicing Jones when the jury returned a verdict to a Class E felony but the trial court sentenced her to Class B felony.

Respondent's argument primarily focuses on overturning established Missouri Supreme Court precedent, and invited error ignoring the fact that Jones suffered a manifest injustice for being found guilty of a one crime but being sentenced for a crime which had much harsher penalties. Invited error does not apply to this situation in which the trial court and state abdicated their duties in ensuring that Jones' constitutional right to only be sentenced to the crime for which she was convicted.

A. *This Court should not overrule State v Wurzberger.*

First, respondent argues that this Court should overrule *State v. Wurzberger*, 40 S.W.3d 893 (Mo. 2001) and find that Jones waived plain-error review by stating she had no objection to the jury instructions and entering into a sentencing agreement with the State. (Resp. Sub. Br. at 16). In support of this argument, respondent, citing *Lucas v. Ashcroft*, 688 S.W.3d 204, 213-14 (Mo. 2024), contends that exceptions to stare decisis apply to the holding of *Wurzberger* in that it was clearly erroneous, it has been demonstrated to be unreasonable and incorrect

through time and experience, and it has resulted in recurring injustice or absurd results. (Resp. Sub. Br. at 16).

Regarding the first exception (clearly erroneous), the respondent puts great weight on the fact that the *Wurzberger* court “never expressly said that stating ‘no objection’ to an instruction does not waive plain-error review.” (Resp. Sub. Br. at 19). While the *Wurzberger* court did not expressly state so, it is implicit in its ruling which is clear - Rule 28.03 does not trump Rule 30.20 regardless if a defendant states “no objection.” Furthermore, respondent argues, without support, that not all instructional errors are subject to plain-error review despite an affirmative statement of “no objection.” (Resp. Sub. Br. at 20). *Wurzberger* holds that all instructional error is subject to plain-error review.

Next, respondent argues that time and experience has shown the *Wurzberger* rule to be unreasonable. Among the cases cited, respondent cites *State v. Bolden*, 371 S.W.3d 802, 806 (Mo. 2012), in which this Court held that defendants could still waive appellate review if they invited instructional error; and the more recent case of *State v. Thompson*, 711 S.W.3d 339 (Mo. 2025). However, both of these cases concern self-invited error which is different than when a defendant has suffered a “manifest injustice or a miscarriage of justice.” Rule 30.20.

Regarding the last exception, the respondent argues that the *Wurzberger* rule has resulted in recurring injustice or absurd results. (Resp. Sub. Br. at 23). The gist of respondent's argument is that *Wurzberger* allows defense counsel to sandbag the trial court by not objecting to an instruction and then raising it on appeal. Here, no strategic purpose would be served by trial counsel allowing Jones to be convicted of a Class E felony and then agreeing to a sentence for a Class B felony.

B. *Jones did not invite error.*

Respondent argues that even if this Court does not overrule *State v. Wurzberger*, it should deny plain-error review because Jones invited the trial court's error. (Resp. Sub. Brief at 26). While Jones does not quarrel with respondent's representation of invited error law, she does disagree that counsel's actions invited error. Here, Jones was charged with a Class B felony but found guilty of a Class E felony. The trial court sentenced her to a Class B felony. Neither the trial court nor the parties noticed the variance between the charge and the instruction. In fact, it is clear from the record that the State did not carefully review the MAI-CR and corresponding instructions prior to submitting its final jury instructions. When the trial court inquired as to the MAI for jury instruction No. 9, the State responded "426.08." The trial court accepted this although MAI-

CR 426.08 (2017 ed.) is the approved instruction for unlawful use of a weapon for discharging a firearm while intoxicated. Defense counsel neither submitted the wrong jury instruction nor advised the trial court that the MAI was “426.08.” Respondent further argues that it would be dangerous precedent to hold the State to its choice of a faulty jury instruction while allowing Jones to exploit it on appeal. Again, Jones has the constitutional right to be sentenced for the crime she is convicted of. Here, she was not convicted of a Class B felony but a Class E felony. It is manifestly unjust for her to receive a sentence in excess of the maximum punishment allowed for a Class E felony. *See State v. Greer*, 348 S.W.3d 149, 153-54 (Mo. App. E.D. 2011).

C. *Jones suffered a manifest injustice.*

Respondent argues, among other things, that there was no material variance between the indictment and the instruction, Jones did not suffer any prejudice due to the variance, the defect was not readily apparent, that the jury intended to convict Jones of the Class B felony of shooting at a motor vehicle, and the State raised its own burden of proof due to the erroneous jury instruction.

A simple reading of the Missouri Improved Instructions would have made it clear to both parties and the court that this instruction was erroneous. The instruction for Mo. Rev. Stat. § 571.030(9) (the crime charged) was MAI-CR 4TH

426.16. The instruction for Mo. Rev. Stat. § 571.030(3) (the crime instructed on) was MAI-CR 4th 426.10. Also, a reading of Mo. Rev. Stat. § 571.030 would have revealed that the giving of Instruction No. 9 was error that was “evident, obvious, and clear.” This was not a case where an equivalent or similar word was substituted in the instruction for words in MAI that did not mislead the jury. *See e.g. State v. Cockrum*, 592 S.W.2d 300, 303 (Mo. App. E.D. 1979). Here, Jones was charged with one crime and the jury was instructed on another. It does not matter whether the State’s burden of proof was lowered, Jones is entitled to be instructed on the crime charged. Again, by changing the language of the instruction from “at” to “into,” the jury received instructions on a completely different and distinct crime that varied from the one charged in the indictment. Jones could not be convicted of another crime and sentenced to a crime with a far greater punishment. As a result, Jones suffered a manifest injustice because of the erroneous instruction.

CONCLUSION

WHEREFORE, for the reasons set out and those in her substitute appellant brief, Jones respectfully requests that this Court vacate her convictions for unlawful use of a weapon and the attendant armed criminal action conviction¹, and release her from prison or any other relief deemed appropriate.

Respectfully submitted,

/s/ Kevin L. Schriener

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¹Again, the conviction for armed criminal action (Count IV) must also be vacated because a conviction for armed criminal action cannot stand unless the defendant is found guilty of the underlying felony offense. *See e.g. State v. Carpenter*, 57 S.W.3d 405, 410 (Mo. App. S.D. 2001).

CERTIFICATE OF COMPLIANCE AND SERVICE

Pursuant to Missouri Supreme Court Rule 84.06(g), I hereby certify that on this 3rd day of September 2025, a true and correct copy of the foregoing substitute reply brief served via the efilings system to Wensdai.Brooks@ago.mo.gov. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03. This brief was prepared with WordPerfect X8, uses Times New Roman 14 point font, and does not exceed the greater of 7,750 words, 550 lines. The word-processing software identified that this brief contains 1,541 words.

/s/Kevin Schriener
KEVIN L. SCHRIENER