

Summary of SC93108, *State of Missouri v. Denford Jackson*

Appeal from the St. Louis circuit court, Judge Michael F. Stelzer
Argued and submitted October 2, 2013; opinion issued June 24, 2014

Attorneys: Jackson was represented by Andrew E. Zleit of the public defender's office in St. Louis, (314) 340-7662; and the state was represented by Shaun J. Mackelprang and Mary H. Moore of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man appeals his convictions for first-degree robbery and armed criminal action, arguing the trial court erred in refusing to give the jury an alternate instruction for the lesser-included offense of second-degree robbery. The Supreme Court of Missouri vacates the convictions and remands (sends back) the case. Six judges agree the man's convictions for first-degree robbery and armed criminal action should be vacated because the trial court erred in not giving the jury the lesser-included instruction for second-degree robbery. The judges' reasons for doing so and the standard to be applied for determining when a trial court must give an instruction for a lesser-included offense, however, are different.

In the principal opinion joined by three judges, Judge Paul C. Wilson describes the Court's holding that a trial court cannot refuse to give a lesser-included offense instruction requested by the defendant when the lesser offense consists of a subset of the elements of the greater charged offense and the differential element – the element required for the charged offense but not for the lesser offense – is one on which the state bears the burden of proof. Under the law, a jury has the right to disbelieve all or part of the evidence, and to refuse to draw needed inferences. Accordingly, unless the right to a jury trial has been waived, the statute cannot be read in any other way than to require that when a lesser-included offense instruction is requested and when the differential element (the one included in the greater offense but not in the lesser offense) is one for which the state bears the burden of proof, all decisions as to what evidence the jury must believe and what inferences the jury must draw are left to the jury, not to judges. As long as the jury has the right to disbelieve all or part of the evidence, and refuse to draw needed inferences, the statute cannot be read in any other way.

The principal opinion addresses how prior decisions of this Court have been interpreted, noting that *State v. Olson*, a 1982 case addressing the statute governing when to give a lesser-included offense instruction was overruled by a series of later cases. The holdings of those later cases are reaffirmed: The jury's right to disbelieve all or 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 the state has failed to prove the differential element. To the extent that *Olson* or any other case suggests anything to the contrary, it is overruled and no longer should be followed. This holding does not do unnecessary violence to the language or intent of the statute and merely acknowledges what already was the law. Because the trial court failed to give the requested lesser-included offense instruction under this standard, the man's conviction must be vacated and the case remanded.

In a separate opinion joined by one other judge, Judge Laura Denvir Stith notes that, although she agrees with the result the principal opinion reaches, she disagrees entirely with its holding that a trial court always must submit a lesser-included offense instruction if requested to do so by a party. Rather, she would hold that this Court should continue to follow Missouri's standard that a trial court is required to submit a lesser-included offense instruction only when a reasonable juror could infer that there is a basis in the evidence for acquitting the defendant of the charged offense and convicting him of the lesser included offense. There is no room for interpretation of the statute governing when to give a lesser-included offense instruction, as its plain meaning is indisputable: A trial court is required to give a lesser-included offense instruction only when there is "a basis in the evidence" for doing so. This Court long has held that whether a sufficient basis in the evidence exists to support instructing down is determined by the reasonable juror standard, and the trial court makes this determination by looking to the evidence. As a corollary to this rule, for a trial court to be obligated to give the lesser-included offense instruction, the differential element must be in dispute. This authority of the trial court to refuse to give a lesser-included offense instruction does not impinge on the defendant's right to a trial by jury, as it does not amount to a directed verdict. Applying Missouri's traditional standard, the trial court erred in not giving the lesser-included offense instruction. Because there was a basis in the evidence from which a reasonable juror could find that the man committed the robbery but did not have a gun or what appeared to be a gun, a reasonable juror could acquit the man of the greater offense and convict him of the lesser offense. On remand, Judge Stith would continue to apply this traditional standard.

In a dissenting opinion joined by one other judge, Judge George W. Draper III would affirm the trial court's judgment. The statute's plain language provides that there must be a basis in the evidence to give a lesser-included offense instruction, and the trial court properly refused to give the second-degree robbery instruction. Although the jury is free to disbelieve all of the state's evidence, there was no basis in the evidence to acquit the man of first-degree robbery.

Facts: The state charged Denford Jackson with first-degree robbery and armed criminal action for an August 2009 robbery at a coffee shop. The state's evidence included the testimony of two customers and one employee of the shop as well as surveillance videos and enlargements of individual frames from the videos. The customers testified that Jackson kept his hand in his pocket during a brief conversation with one of them; that they later saw him standing close behind the employee, behind the counter, at the cash register; and that they did not know anything had happened until the employee ran out of the kitchen saying she had been robbed. The employee testified Jackson came into the kitchen from a door behind the cash register, grabbed her, turned her around and walked her back toward the cash register. She said she felt something in her back, looked down and saw a "silverish" revolver. She gave Jackson money from the cash register; he took her back into the kitchen, patted her down looking for more money, then left; and then she called for help. The surveillance videos corroborated the testimony of the three witnesses and briefly showed the object in Jackson's hand. A police detective who viewed these videos as well as enlargements of individual frames from the videos testified that he could see Jackson holding a small, dark blue or black pistol to the employee's back and that, before Jackson entered the kitchen, his gestures distinctively were those of someone checking a revolver to see if it is loaded. At the close of evidence, defense counsel asked the trial court to give the jury instructions for both first-degree robbery and the lesser-

included offense of second-degree robbery. The only difference between the two types of robbery is that only first-degree robbery requires a finding that, in the course of taking property, the defendant displayed or threatened to use what appeared to be a deadly weapon or dangerous instrument. Defense counsel argued the jury could disbelieve the employee's testimony or believe she did not have a reasonable belief that Jackson had a gun. The trial court refused to give the jury the second-degree robbery instruction. The jury found Jackson guilty of first-degree robbery and armed criminal action. The court entered judgment accordingly and sentenced him to prison. Jackson appeals.

VACATED AND REMANDED.

Court en banc holds: (1) A trial court cannot refuse to give a lesser-included offense instruction requested by the defendant under section 556.046, RSMo, when the lesser offense consists of a subset of the elements of the greater charged offense and the differential element – the element required for the charged offense but not for the lesser offense – is one on which the state bears the burden of proof. Subsection 2 of section 556.046 provides that a trial court “shall not be obligated” to instruct the jury regarding an included offense “unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.” Subsection 3, however, provides that the “court shall be obligated” to instruct the jury regarding a “particular included offense only if there is a basis in the evidence for acquitting the defendant of the immediately higher included offense and there is a basis in the evidence for acquitting the defendant of that particular included offense.” Read together, these subsections provide that a trial court is obligated to give an instruction on a first-level lesser-included offense when each of three requirements is met: a party timely requests the instruction; there is a basis in the evidence for acquitting the defendant of the charged offense; and there is a basis in the evidence for convicting the defendant of the lesser-included offense for which the instruction is requested.

(2) Unless the right to a jury trial has been waived, when a lesser-included offense instruction is requested and when the differential element is one for which the state bears the burden of proof, all decisions as to what evidence the jury must believe and what inferences the jury must draw are left to the jury, not to judges. As long as the jury has the right to disbelieve all or part of the evidence, and refuse to draw needed inferences, section 556.046 cannot be read in any other way. No matter how clear something may seem to lawyers and judges, courts should avoid the temptation to usurp the jury's role, because, in a criminal case, no evidence *ever* proves an element until all 12 jurors believe it and no inference *ever* is drawn until all 12 jurors draw it. This gives certainty not only to the defendant but also to the state and the trial court. Otherwise, if the question of whether the trial court will give a lesser-included instruction were left until the end of the trial, when the trial court sifts and weighs the evidence to determine which elements, if any, a reasonable juror must find, the defendant would have to prepare and try his case never knowing for sure whether the court would give the lesser-included offense instruction.

(3) Despite having been overruled, the state continues to rely on this Court's 1982 decision in *State v. Olson* for the proposition that a jury's right to disbelieve part or all of the state's evidence cannot constitute, by itself, a “basis in the evidence” to acquit a defendant of the greater or crime for purposes of section 556.046. But *Olson*'s interpretation of the statute was overruled – though not strongly enough – in this Court's 1997 decision in *State v. Santillan*, this Court's

2004 decision in *State v. Pond* and this Court's 2010 decision in *State v. Williams*. *Santillan* held that the defendant is not required to put on affirmative evidence to support the lesser offense or refute the greater. *Pond* and *Williams* held that there is no requirement for such affirmative evidence regardless of who adduces it. Neither *Pond* nor *Williams* expressly overruled the remainder of *Olson* on which the state repeatedly, but unsuccessfully, relies. Now, the Court holds expressly what *Pond* and *Williams* only may have implied: A defendant not only does not need to introduce affirmative evidence, but he also does not have to "cast doubt" over the state's evidence via cross-examination or explain to the judge or jury precisely how or why the jury can disbelieve that evidence and so acquit him of the greater offense and convict him of the lesser offense. The holdings of *Santillan*, *Pond* and *Williams* are reaffirmed. To be clear: The jury's right to disbelieve all or 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 the state has failed to prove the differential element. To the extent that *Olson* or any other case suggests anything to the contrary, it is overruled and no longer should be followed.

(4) This holding does not do unnecessary violence to the language or intent of section 556.046. This Court serves the criminal justice system best when it says what it means and means what it says. When a defendant requests an instruction for a lesser-included offense that consists of a subset of the elements of the charged offense, that instruction must be given. While the Court in *Williams* quoted "reasonable juror" language, the basis for the holding in *Williams* was that the jury was entitled to believe all, part or none of the evidence, not that such a belief or disbelief was reasonable. Nor will the Court's holding give the jury an opportunity to convict a defendant of a crime for which there is no basis in the record to find him guilty and of which the state has not proved him guilty. As this Court previously has held, when dealing with "nested" lesser-included offenses – those comprised of a subset of the elements of the charged offense – it is impossible to commit the greater offense without necessarily committing the lesser. The Court's decision today merely acknowledges what already was the law, and it is not inconsistent with United States Supreme Court precedent. The Supreme Court has stated repeatedly that criminal guilt is to be determined by the jury, not the judge, and that a court cannot usurp the jury's role simply because it finds that the evidence establishes an element beyond dispute. Further, to the extent the model penal code provides that a court need not give a lesser-included offense unless there is "a rational basis" for a verdict acquitting the defendant of the greater offense and convicting him of the included offense, when Missouri's legislature adopted other parts of the model penal code, it did not adopt this provision, leaving intact the language in section 556.046.2 requiring only "a basis," not "a rational basis."

(5) The language of section 556.046 must be applied in context of the constitutional imperatives of the presumption of innocence and the right to a trial by jury. To the extent the purpose of section 556.046 is to make a lesser-included offense instruction available in one case and not in another based on how strong or weak the judge believes the state's evidence to be – no matter how compelling the judge believes the evidence to be – there simply is no way for the Court to give a reasonable construction to the phrases "a basis in the evidence to acquit the defendant" in subsection 3 or "a basis for a verdict acquitting the defendant" in subsection 2 to achieve such an end without undermining the fundamental values embodied in the presumption of innocence and the right to a jury trial. This Court long has been faithful to the basic principle that entering a plea of "not guilty" is all a defendant needs to do to put the government to its proof on every

element of the crime. Any attempt to narrow this principle so that a not-guilty plea only puts in dispute those elements about which a court believes reasonable jurors can disagree comes dangerously close to denying the defendant the fair trial to which he is entitled under the state and federal constitutions.

(5) The evidence was sufficient to support an instruction for second-degree robbery. The only of the three requirements described in Paragraph 1 that is in dispute is the second – whether there was a basis in the evidence for acquitting Jackson of first-degree robbery. For such a basis to exist, there must be a basis in the evidence for concluding the state failed to prove the differential element: whether the employee believed – subjectively, but reasonably – the object Jackson held to her back throughout the robbery was a gun. When a court decides what instructions to give the jury in a criminal case under section 556.046 based on what a reasonable juror must or must not find, or on what a reasonable juror must or must not infer, however, the court tacks too close to directing a verdict in a criminal case impermissibly. In concluding that the evidence was so compelling that the jury *must* believe the employee saw something in Jackson’s hand and *must* infer that she reasonably believed it was a gun, therefore, the trial court erred. The effect of such a ruling was the same as a directed verdict on the differential element. Accordingly, Jackson’s conviction for first-degree robbery is vacated. And, because the jury’s verdict convicting Jackson of armed criminal action was predicated on its verdict convicting him of first-degree robbery, the armed criminal action conviction must be vacated as well.

Opinion concurring in part and dissenting in part by Judge Stith: Although the author agrees with the result the principal opinion reaches, she disagrees entirely with its holding that a trial court always must submit a lesser-included offense instruction if requested to do so by a party. Rather, she would hold that a trial court must submit a lesser-included offense instruction only if there is a basis in the evidence supporting that instruction.

(1) This Court should continue to follow Missouri’s well-established standard that giving a lesser-included offense instruction is required only when there is a basis in the evidence from which a reasonable juror could draw inferences from the evidence to acquit the defendant of the charged offense and convict him of the lesser included offense. This Court’s 2010 decision in *State v. Williams* – while reaffirming that a defendant need not put on affirmative evidence to support a request for a lesser-included offense instruction – expressly reaffirmed this standard. All but two of Missouri’s sister states and the United States Supreme Court require at least this standard of evidence to submit a lesser included offense. The fact that all decisions as to what evidence the jury must believe and what inferences it must draw are left to the jury does not mean, as a corollary rule, that a lesser-included offense instruction must be given in every case if requested. No court in Missouri ever before has reached this conclusion. The jury’s right to find facts cannot shape the trial court’s declaration of the law, and the jury’s ability to disregard the law does not deprive the court of its fundamental authority to declare and instruct on the law. Of course – as noted in *Williams*, *Pond* and other cases – the jury can believe or disbelieve any and all evidence. But just as it is the jury’s role to decide what it believes, it still is the court’s duty to decide what instructions to give the jury based on which instructions are supported by the evidence. A trial court’s authority to refuse to give a lesser-included offense instruction does not constitute a directed verdict against the defendant and does not impinge on the defendant’s right to a trial by jury. Likewise, the trial court’s authority to review the evidence to determine what

facts a jury reasonably can and cannot find does not infringe impermissibly on the jury's ability to believe or disbelieve any or all of the evidence.

(2) By its terms, section 556.046, RSMo, provides that Missouri courts need not give a lesser-included offense instruction unless there is a basis in the evidence to do so. The principal opinion correctly states that, taken together, subsections 2 and 3 of this section 556.046 mean that a trial court is obligated to give a lesser-included offense instruction only when three requirements are met: a party timely requests the instruction; there is a basis in the evidence for acquitting the defendant of the charged offense; and there is a basis in the evidence for convicting the defendant of the lesser-included offense for which the instruction is requested. But the principal opinion's interpretation – that, because the jury can believe any and all evidence, there always is a basis in the evidence, so these requirements always are satisfied if a timely request is made – guts subsections 2 and 3 of their express requirements that a trial court is obligated to give a lesser-included offense instruction only in limited circumstances. The principal opinion's reasoning renders the requirement that there be a basis in the evidence mere surplusage, thereby nullifying it and overruling, *sub silencio* (without expressly doing so), an entire line of case law giving meaning to this statutory requirement. This Court repeatedly has identified the proper approach to construing a statute: to consider the language of the statute and the words employed in their plain and ordinary meaning, and when the language is clear and unambiguous, there is no room for construction. Applying these principles here, there is no room for statutory interpretation, as the plain meaning of subsections 2 and 3 is indisputable: A trial court is required to give a lesser-included offense instruction only when there is “a basis in the evidence” for doing so. The principal opinion's new rule will allow for precisely the same arbitrary decision-making the United States Supreme Court has sought to avoid in approving a trial court's refusal to give a lesser-included instruction.

(3) Prior Missouri cases require a trial court to give a lesser-included offense instruction only when there is a basis in the evidence to do so. Like its predecessors, *Williams* does not state that a court must give a lesser-included offense instruction whenever so requested. To the contrary, it reaffirms the well-established rule that a defendant's entitlement to a lesser-included offense instruction under section 556.046.2 is determined by whether a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established. This Court long has held that, when determining whether there is a basis to acquit of the offense charged and convict of the lesser-included offense, the trial court looks at the evidence. For a trial court to be obligated to give the lesser-included offense instruction, the differential element must be in dispute. Just as *Williams* does not hold that a party always is entitled to a lesser-included offense instruction if it requests one, neither does it abandon the reasonable juror standard for determining when a lesser-included offense instruction is – and is not – warranted. In fact, the reasonable juror standard is a cornerstone of this Court's lesser-included offense instruction law. And as this Court repeatedly has emphasized, a decision of this Court should not be overruled lightly. The principal opinion's departure from this Court's previous interpretation of sections 556.046.2 and 556.046.3 without any directly supporting authority is precisely the type of action that *stare decisis* (the policy of courts to adhere to principles established in prior case decisions) is designed to restrain. Moreover, this Court's traditional requirement that there be a basis in the evidence from which a rational juror could

acquit a defendant of the greater offense and convict of the lesser-included offense is consistent with the law of the United States Supreme Court and nearly every other state court.

(4) The principal opinion is correct that the trial court in this case should have instructed the jury on the lesser-included offense of second-degree robbery. Applying Missouri's traditional lesser-included offense law, there was a basis in the evidence from which a reasonable juror could find that Jackson committed the robbery but did not have a gun or what appeared to be a gun. Accordingly, a reasonable juror could acquit Jackson of the greater offense and convict him of the lesser offense. His conviction, therefore, should be vacated and the case remanded. But the standard to be applied on remand should be the one always applied in Missouri until today.

Dissenting opinion by Judge Draper: The author would affirm the trial court's judgment. The trial court properly refused to give the instruction for the lesser-included offense of second-degree robbery. The plain language of the statute provides that there must be a basis in the evidence to give a lesser-included offense instruction. In prior cases in which this Court required a lesser-included offense instruction to be given, conflicting testimony provided a basis in the evidence to give the lesser-included offense instructions. Here, although the jury is free to disbelieve all of the state's evidence, there was no basis in the evidence to acquit the man of first-degree robbery. There was no contradictory evidence regarding the presence of a gun during the robbery, nor was there any evidence that the man committed the robbery by any other method than by the use of a dangerous instrument or deadly weapon.