

## **Summary of SC94711, *State of Missouri v. Brandon M. Roberts***

Appeal from the Buchanan County circuit court, Judge Patrick K. Robb  
Argued and submitted April 22, 2015; opinion issued August 4, 2015

**Attorneys:** Roberts was represented by Ellen H. Flottman of the public defender's office in Columbia, (573) 777-9977; and the state was represented by Shaun J. Mackelprang 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 found guilty of second-degree domestic assault and witness tampering appeals the trial court's judgment. In a unanimous decision written by Judge Richard B. Teitelman, the Supreme Court of Missouri vacates the judgments and remands (sends back) the case. Because third-degree domestic assault is a "nested" lesser-included offense of second-degree domestic assault, the trial court erred in refusing to give the jury the man's proposed instruction for third-degree domestic assault. Although the trial court did not abuse its discretion in overruling the man's motion to sever the assault and tampering charges, because the tampering conviction was based on the assault conviction, it also must be vacated.

**Facts:** The state charged Brandon Roberts with second-degree domestic assault and witness tampering. The state alleged that, in June 2012, Roberts and his daughter lived with a woman and the woman's three children. The state alleged that, after Roberts and the woman got into a disagreement, Roberts hit the woman repeatedly with a hammer in front of the children. The state further alleged Roberts subsequently attempted to persuade the woman not to testify against him. At trial, Roberts testified he acted in self-defense. The trial court instructed the jury that it could find Roberts guilty of second-degree domestic assault if the state proved, beyond a reasonable doubt, that Roberts "knowingly" caused injury to the woman. The court rejected Roberts' proposed instruction for the lesser-included offense of third-degree domestic assault, which would require the jury to find that Roberts "recklessly" injured the woman. The court also overruled Roberts' motion to sever (separate) the charges. The jury found Roberts guilty as charged. The court sentenced Roberts to consecutive prison sentences of five years for second-degree assault and two years for witness tampering. Roberts appeals.

### **VACATED AND REMANDED.**

**Court en banc holds:** (1) The trial court erred in refusing to give the jury Roberts' proposed instruction for the lesser-included offense of third-degree assault. As this Court held in the 2014 decision in *State v. Jackson*, because a jury has a right to disbelieve all, some or none of the evidence presented in any particular case, there almost always is a basis in the evidence for acquitting a defendant of an immediately higher-included offense. When a lesser-included offense is "nested" – when it is separated from the higher offense by one differential element for which the state bears the burden of proof – a defendant is entitled, upon proper request, to an instruction for the nested lesser-included offense. Second- and third-degree domestic assault are nested lesser-included offenses. They both require the state to prove the infliction of physical

injury to a family or household member; the mental state is the differential element, with second-degree domestic assault requiring proof that the defendant acted “knowingly” and third-degree domestic assault requiring proof that the defendant acted “recklessly.” As such, if Roberts “knowingly” inflicted physical injury, he necessarily engaged in conduct sufficient to establish that he “recklessly” inflicted physical injury. He was entitled, therefore, to his requested instruction. The judgment convicting Roberts for second-degree domestic assault is vacated.

(2) The trial court did not abuse its discretion in overruling Roberts’ motion for severance. The relevant statute and court rule both provide that offenses can be joined if they are based on transactions that are “connected” by their dependence and relationship to one another. The alleged assault and alleged witness tampering plainly are connected because the alleged tampering would not have occurred in the absence of the alleged assault and the alleged tampering was aimed directly at evading responsibility for the alleged assault. Severance of the charges was not required. The two offenses have distinct and relatively simple elements. It is unlikely that joining the two charges would confuse the jury, nor would it invite the jury to convict Roberts based on irrelevant evidence. Joinder was appropriate. Because the judgment convicting Roberts for witness tampering was based on the assault conviction, however, it must be vacated as well.