IN THE
SUPREME COURT OF MISSOURI

State Of Missouri,	)	
	)	
Respondent,	)	
	)	
vs.	)	APPEAL NO. SC94646
	)	
Anwar Randle,	)	
	)	
Appellant.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY,
DIVISION ONE,
THE HONORABLE ROBERT S. COHEN,
JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This case is an appeal from the sentence and judgment imposed and executed in case no. 09SL-CR08751-01 by the Honorable Robert S. Cohen, division one of the Circuit of St. Louis County. In that case, Judge Cohen found Appellant guilty, pursuant to a jury trial, of committing one count of the class B misdemeanor of trespass in the first degree in violation of § 569.140 RSMo, one count of the class C felony of assault in the second degree in violation of § 565.060.1(2) RSMo, and one count of the unclassified felony of armed criminal action in violation of § 571.015 RSMo. Subsequently, Judge Cohen sentenced Appellant to serve six months in the St. Louis County Jail on the charge of trespass first, seven years in the Missouri Department of Corrections on the charge of assault in the second degree, and seven years in the Missouri Department of corrections on the charge of armed criminal action.

In ED99137, Appellant appealed the sentence and judgment Judge Cohen handed down in 09SL-CR08751-01 to the Missouri Court of Appeals for the Eastern District pursuant to the provision of Article V, Section 3 of the Missouri Constitution and § 477.050 RSMo. Mo. Const., Art. V, § 3; § 477.050 RSMo. The Missouri Court of Appeals denied that appeal. Appellant then filed a motion for rehearing, which was also denied. Appellant then applied for and was granted transfer to this Court. As such, this Court has jurisdiction to hear this matter pursuant to the provisions of Article V, Section 10 of the Missouri Constitution and Rule 83.04. Mo. Const., Art. V, § 10; Rule 83.04.

STATEMENT OF FACTS

In 09SL-CR08751-01, the state filed an information in lieu of indictment alleging that Appellant committed four crimes. (L.F. 110-111).[1] In count I, the state alleged that Appellant committed the class B felony of burglary in the first degree in violation of § 569.160 RSMo[2] in that on or about November 2, 2009, Appellant, acting with others, knowingly entered unlawfully in an inhabitable structure, which was located at 10146 Earl Drive and possessed by Cameron Bass, for the purpose of committing assault therein, and that Cameron Bass, Kena Coleman, and others, who were not participants in the crime, were present therein. (L.F. 110). In count II, the state alleged that Appellant committed the felony of armed criminal action in violation of § 571.015 RSMo in that on or about November 2, 2009, Appellant, acting with others, committed the felony charged in count I with and through the knowing use, assistance, and aid of a deadly weapon. (L.F. 110-111). In count III, the state alleged that Appellant committed the class B felony of assault in the first degree in violation of § 565.050 RSMo in that on or about November 2, 2009, Appellant, acting with others, shattered a glass bottle on Cameron

[1] The record on appeal consists of a trial transcript, (Tr.), a two volume legal file that was filed on July 15, 2013 in ED99137, (L.F.), and a supplemental legal file that was filed on May 1, 2014 in ED99137, (Supp. L.F.).

[2] All statutory references are to the Missouri Revised Statutes, 2000 edition, unless otherwise noted.

Bass's head, and that such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to Cameron Bass, and was done for the purpose of committing such assault. (L.F. 111). In count IV, the state alleged that Appellant committed the felony of armed criminal action in violation of § 571.015 RSMo in that on or about November 2, 2009, Appellant, acting with others, committed the felony charged in count III with and through the knowing use, assistance, and aid of a dangerous instrument. (L.F. 111). The case went to trial the week of August 20, 2012. (L.F. 113-115).

Summary of Cameron Bass's Testimony

On November 2, 2009, Cameron Bass was living with his girlfriend, Kena Coleman, and her three children at 10146 Earl Drive. (Tr. 101-102). He was sleeping there at one o'clock on the morning of November 2, 2009, when he heard a loud noise. (Tr. 103). His girlfriend, Kena, who was sleeping with him, told him to stay where he was and then went to see what the noise was. (Tr. 103). By the time Kena got out of the room, Cameron heard some voices. (Tr. 103). The voices were telling Kena to get back in the room and asking: "where is he at." (Tr. 103-104). At that point, Cameron hid in the closet (Tr. 104). While hiding in the closet, Cameron saw two men push their way into the room. (Tr. 106-108). Appellant was one of the men. (Tr. 107). The other man was someone who was later identified as "Mr. Obasogie." (Tr. 107-108). Cameron had seen Appellant the week before, but had not seen the other man before. (Tr. 107). Kena had three children, including Tashana. (Tr. 102). The week before, Cameron had seen Appellant picking Tashana up to take her out of town with him. (Tr. 107).

The two men tried to get Cameron to come "outside." (Tr. 108). Cameron started to come out, but then saw a gun and went back in. (Tr. 108). Both of the men had something in their hands. (Tr. 108). Appellant had a vodka bottle and the other man had a handgun. (Tr. 108). At some point, while the two men were telling him to come outside, the handgun went off. (Tr. 108-109). At that point, Cameron ran back through the closet to another room. (Tr. 109). Cameron explained that the closet connected to Tashana's room. (Tr. 109).

Cameron made it to Tashana's room. (Tr. 112). At that point, he tried to go out of the house through a window. (Tr. 112). However, he saw a third man standing outside in the back with a shotgun. (Tr. 112). Upon seeing this third man, Cameron hesitated and stayed right where he was. (Tr. 112).

Cameron said "they" eventually got into Tashana's room. (Tr. 112). When asked whom he meant when he said "they," Cameron responded by saying "Mr. Randle" and the man with the shotgun. (Tr. 112). Cameron explained that the third man, the man who was outside when Cameron first got to the window in Tashana's room and who had the shotgun, proceeded to come inside through the backdoor of the residence. (Tr. 130-132, 133). Cameron further explained that the man with the handgun, Mr. Obasogie, did not come into Tashana's room, that he did not see Mr. Obasogie again, and that he did not know where Mr. Obasogie was when Appellant and the man with the shotgun came into Tashana's room. (Tr. 131-133).

Cameron went on to testify as to what happened after Appellant and the man with the shotgun got into Tashana's room. The man with the shotgun tried to fire the shotgun,

but it would not fire, so he started hitting Cameron with it. (Tr. 133). When asked to estimate the number of times, the man with the shotgun hit him, Cameron said "probably about five times." (Tr. 133). The man with the shotgun was just wailing on Cameron with the shotgun. (Tr. 133). Cameron also said that Mr. Randle hit him in the head with the vodka bottle and that the vodka bottle busted on his head. (Tr. 113-114). Kena was trying to push people apart and told the men to stop and to get out. (Tr. 134). Eventually, the men took off. (Tr. 115). One of the men said something along the lines of: If I have to come back, I'm going to kill you. (Tr. 113). Cameron identified state's exhibits 11, 12, and 13 as photos of Tashana's room showing broken glass from the broken vodka bottle, (Tr. 114), and state's exhibits 14 and 15 as photos of his head where Appellant had hit him with the vodka bottle. (Tr. 115)[3].

After the men left, Cameron called 911. (Tr. 114-115). The police responded and Cameron gave them his version of events. (Tr. 117). Subsequently, the police took Cameron to a location where he identified Appellant and Mr. Obasagie, as well as a jacket that Cameron said belonged to the third man. (Tr. 118).

Summary of Kena Coleman's Story

On November 2, 2009, Kena Coleman was living at 10146 Earl Drive with her three kids and Cameron. (Tr. 138-139). Kena had two boys, ages three and four, as well as a daughter named Tashana who was six. (Tr. 139). Tashana was not home in the early

[3] Appellant will request the Attorney General's Office to file copies of state's exhibits 14 and 15 with this Court for reference.

morning hours of November 2, 2009. (Tr. 139). Tashana was at Kena's sister's house. (Tr. 139).

Kena had a relationship with Appellant. (Tr. 139). Kena first met Appellant in 2000 or 2001. (Tr. 155). They were on good terms and had a romantic relationship. (Tr. 155). They had this relationship even while Appellant was in prison for a gun charge in Illinois. (Tr. 140, 157). During Appellant's incarceration, Kena would visit Appellant, put money on his books, and exchange letters with him on a weekly basis. (Tr. 140, 157). These letters were of a romantic nature. (Tr. 157). Keena and Appellant talked about a future together. (Tr. 158). They talked about marriage. (Tr. 158). Kena would even sign some of the letters "Kena Coleman Randle." (Tr. 158). Kena wanted to be with Appellant when he got out of prison. (Tr. 158). Kena even went so far as to secure housing for her, Appellant, and her kids in Belleville, IL. (Tr. 158). And at the time of the incidents giving rise to this case, Kena believed that Appellant was Tashana's biological father. (Tr. 140, 179). It was not until after the incident that Kena found out that Appellant was not Tashana's biological father. (Tr. 179).

About a month or so before the incidents giving rise to this case, Appellant got out of prison. (141). After Appellant got out of prison, Kena and Appellant communicated through phone calls. (Tr. 141). Kena admitted that she met Appellant somewhere in "a prearranged meeting" prior to Tashana's birthday. (Tr. 141). Kena further testified that she invited Appellant to come over to her house for Tashana's birthday, which was on October 24, 2009, and that Appellant did so. (Tr. 141-142). Kena did say that Appellant did not get out of the car on this occasion, that Cameron was at her house at the time, and

that she simply brought Tashana to the car so that Appellant could speak to her and give her a birthday gift. (Tr. 142). Kena also said that the very next day, Appellant came by her house again to pick Tashana up so that he could take her to Chicago for a week. (Tr. 142-143). The week was up on November 1, 2009. (Tr. 143).

On November 1, 2009, Kena spoke to Appellant by phone and told him to drop Tashana off at Tashana's aunt's house. (Tr. 143). She explained that she did not want Appellant at her house because Cameron was there and because she didn't want any tension between the two of them. (Tr. 143). Appellant complied with this request, (Tr. 143-144). Kena said she knew this because somebody called her to let her know. (Tr. 144).

At around one in the morning on November 2, 2009, Cameron woke Kena up and told her he had heard a loud noise in the kitchen. (Tr. 144-145). Kena got up and went to see what the noise was and saw "Shawn," looking at her boys' room.[4] (Tr. 145). Kena also saw two men she did not know coming into her laundry room through her back door (Tr. 146). One of the men had a handgun and the other had a shotgun (Tr. 147). Kena started screaming at the men to leave (Tr. 147).

The men did not leave. (Tr. 147). Instead, the men asked Kena where Cameron was. (Tr. 147). The man with the shotgun then grabbed Kena and pulled her into the

[4] Kena referred to Appellant as "Shawn" at this point in the transcript. Various people call Appellant "Shawn" throughout the transcript. Appellant testified that he normally goes by "Shawn." (Tr. 245).

hallway. (Tr. 148). Appellant and the man with the handgun then went into the bedroom where Cameron was. (Tr. 148). Kena then heard a gun go off. (Tr. 148). Upon hearing the gun go off, Kena ran into the bedroom and saw the man with the handgun looking at a hole in the wall. (Tr. 149). Kena did not see Cameron at that point. (Tr. 149). Cameron had run into Tashana's room. (Tr. 149).

At that point, Appellant and the man with the "rifle" went into Tashana's room as well. (Tr. 149). Kena stood between Appellant and Cameron and the man with the shotgun. (Tr. 149). Kena said she then saw Appellant hit Cameron with the bottle. (Tr. 149-50). Some of the glass got on her. (Tr. 150). After that, the men left. (Tr. 150).

Kena identified some photographs for the prosecutor. She identified State's Exhibit 19 as a close up photograph of her backdoor. (Tr. 151). The door was cracked and had mud on it. (Tr. 151). Kena testified that the door was not like that when she had gone to bed. (Tr. 151). The doorjamb was also broken, and it was not like that when she had gone to bed. (Tr. 152). Kena claimed that Appellant had never been to her house and that he did not have a key. (Tr. 153).

Kena testified that the police were called. (Tr. 153). They arrived within a minute or so of the phone call. (Tr. 153). The police arrived shortly after Appellant left (Tr. 153). They took Kena to some location she referred to as "the storage bins on Chambers." (Tr. 153-1544). There Kena identified Appellant, Mr. Obasogie, and a jacket that the third man had been wearing (Tr. 154).

Officer Louis Bouwman's Testimony

Officer Bouwman was dispatched to 10146 Earl at about one in the morning on November 2, 2009. (Tr. 185). He got to the house within a minute or two of getting the call. (Tr. 186). He met with Cameron, who was bleeding from his forehead and upset. (Tr. 186). He noticed a bullet hole, broken glass, and the backdoor with mud on the outside and the door jam laying on the floor. (Tr. 188). He eventually took Cameron to a second location to identify some suspects (Tr. 189-90). Cameron identified Appellant and a second man who was with Appellant. (Tr. 190).

Officer Nicki Brown's Testimony

Officer Brown was also dispatched to 10146 Earl at about one in the morning on November 2, 2009. (Tr. 195-196). On her way to the house, she saw a vehicle with three men inside and decided to stop the vehicle. (Tr. 196-197). She turned on her emergency lights in an effort to stop the vehicle. (Tr. 198). However, the vehicle did not stop. (Tr. 198). Instead, it turned onto "Lord" street and made an abrupt stop before continuing on. (Tr. 198). At that point, one of the men exited the vehicle and took off running. (Tr. 198). The vehicle then took off at a high rate of speed down "Lord" street. (Tr. 198). The vehicle was travelling at speeds of 60 miles per hour where the speed limit was 30 or 35 miles per hour. (Tr. 200). Eventually, Officer Brown and other officers trapped the car on a storage lot and took the occupants into custody. (Tr. 200-203). Appellant was a passenger of that vehicle. (Tr. 202). The driver was also taken into custody. (Tr. 203). Officer Brown searched Appellant and did not find any weapons or keys on Appellant. (Tr. 204). The vehicle was also searched. (Tr. 205). The driver's keys were in the

ignition, but no other keys were found. (Tr. 205). The third guy was never caught. (Tr. 206).

Officer Don May's Testimony

Officer May also responded to a call for a home invasion on Earl in the early morning hours of November 2, 2009. (Tr. 213). En route, Officer May got a call from Officer Brown saying she was trying to stop car and responded to her location. (Tr. 214). Officer May took the driver into custody and found rubber gloves in the right pocket of his jacket. (Tr. 215).

Detective Patrick Beachamp's Testimony

Officer Beachamp responded to 10146 Earl in the early morning hours of November 2, 2009. (Tr. 218). He took several photos of the home (Tr. 218). One of the pictures was of a bullet hole in the wall of the master bedroom. (Tr. 218-19). He tried to cut away part of the wall to see if he could recover the actual bullet, but he could not (Tr. 219). He took pictures of a fired cartridge casing in the master bedroom (Tr. 219-20). He seized the cartridge (Tr. 220). He also took pictures of glass fragments strewn about one of the children's bedrooms. (Tr. 228-229).

Jamaal Randle's testimony

Jamaal is Appellant's brother. (Tr. 233). He testified that he had taken his brother to Kena's house on at least three occasions in September and October of 2009. (Tr. 234). On at least one of those occasions, he saw Appellant enter Kena's home with keys (Tr. 234). On other occasions he saw Kena welcome Anwar into her home. (Tr. 235).

Appellant's Testimony

Appellant normally goes by the name of Shawn. (Tr. 245). He is a college graduate who has done some work in the drug treatment field as "far as intake and stuff like that." (Tr. 250). Appellant met Kena at church one day in 2003. (Tr. 245). Eventually they started dating and then she moved in with him. (Tr. 245). They lived together from 2003 up until Appellant ran into legal issues. (Tr. 245-246). Appellant pled guilty to aggravated discharge of a firearm and ended up doing some time in the Illinois Department of Corrections. (Tr. 246). He was sentenced in the middle of December of 2005. (Tr. 246).

While Appellant was in prison, he married Kena, (Tr. 258), and they made plans to live together when he got released from prison. (Tr. 259). Kena even got a place a 643 Vicksburg in Belleville, Illinois. (Tr. 259). However, those plans never materialized. (Tr. 259). Kena got Section 8 housing in St. Louis County, (Tr. 259), and appellant decided to parole to his sister's house in Chicago because of his parole restrictions and desire to be in Illinois. (Tr. 259-260). Appellant was paroled on July 21, 2009. (Tr. 262).

After, getting out of prison, Appellant continued to have a relationship with Kena. (Tr. 263). He would visit her and spend the night at her house. (Tr. 263). They even agreed that he would take Tashana to Chicago with him for a week and he did. (Tr. 266).

Eventually, it was time to take Tashana back to St. Louis. (Tr. 268). When he got to st. Louis, he called Kena and Kena told Appellant she was at her sister's house and that he should come over there. (Tr. 269). When he got there, Kena wasn't there. (Tr. 269). Appellant waited around for an hour and then decided to go to Kena's house. (Tr. 269). He left Tashana at Tashana's aunt's house. (Tr. 269).

When Appellant got to Kena's house, he used his keys to get in. (Tr. 269). Appellant testified that he had the keys to Kena's place since he first got out of prison. (Tr. 269). The first thing Appellant did when he got to Kena's place was stop in Kena's boys' room so he could check on them. (Tr. 270). Eventually, Appellant saw Kena. (Tr. 270). After seeing Kena, Appellant went into the bedroom with a black plastic bag and a bottle of vodka he had with him. (Tr. 271). He set down the vodka and noticed the room smelled funny (Tr. 272). It smelled like PCP smells when it is smoked (Tr. 272). Appellant knew what PCP smells like from doing intake at drug treatment facilities (Tr. 284).

Appellant turned around to say something to Kena. (Tr. 272). That's when Cameron jumped out of the closet, lunging at him. (Tr. 272). A gun Cameron had in his hand went off. (Tr. 273). Cameron and Appellant began to wrestle (Tr. 273). Cameron looked crazy. (Tr. 273). He kept attacking Appellant. (Tr. 273). So Appellant grabbed the vodka bottle and threw it at Cameron (Tr. 273-74). The bottle shattered against the wall. (Tr. 274). Appellant and Cameron wrestled some more. (Tr. 274). Appellant asked Kena to tell Cameron to leave. (Tr. 274). Kena's two young boys got up, and she grabbed them and shuffled them away (Tr. 274). Appellant left the house, telling Kena that she had better have Cameron out of the house before he got back (Tr. 275).

Meanwhile, Mr. Obasogie was asleep in his car (Tr. 275). Appellant woke him and they drove away. (Tr. 275). When the initial police officer tried to stop them, Mr. Obasogie did not want to pull over because he had marijuana on him, so he had to get rid of the marijuana before he could pull over. (Tr. 276). Eventually, Mr. Obasaogie stopped

the car and pulled over. (Tr. 276). The police arrested Appellant. (Tr. 276). When he was able to bond out of the jail, Kena immediately called him (Tr. 277).

Appellant believed he was allowed to be at Kena's house (Tr. 292). At one point his attorney asked him the following question: "So did you believe that you were allowed to be at the house on Earl?" (Tr. 292). Appellant responded by saying the following:

"Yes, I mean, the only way I could travel to come there on a travel permit by the state. One, Kena was my legal wife, and two, if I had some type of ties to the home that I was going to. She had to send them some paperwork saying that I was on the lease to allow me to come here." (Tr. 292).

The Jury's Verdicts and Sentences Imposed

Although Appellant was charged as an accomplice in counts I-IV, (L.F. 110-111), the only count that was submitted to the jury under a theory of accomplice liability was count II. (L.F. 13-138). The jury found Appellant guilty of committing one count of the class B misdemeanor of trespass in the first degree in violation of § 569.140 RSMo, one count of the class C felony of assault in the second degree in violation of § 565.060.1(2) RSMo, and one count of the unclassified felony of armed criminal action in violation of § 571.015 RSMo. (Tr. 358, L.F. 265). The jury also acquitted Appellant of count II. (Tr. 358). Subsequently, Judge Cohen sentenced Appellant to serve six months in the St. Louis County Jail on the charge of trespass first, seven years in the Missouri Department of Corrections on the charge of assault in the second degree, and seven years in the Missouri Department of corrections on the charge of armed criminal action. (L.F. 267).

Judge Cohen further ordered that all three of these sentences are to run concurrently with each other. (L.F. 267).

POINTS RELIED ON

I.

The trial court erred in failing to give Appellant's refused jury instruction "A," a jury instruction patterned on MAI CR 3d 319.16 on the offense of assault in the third degree, because the failure to give that instruction violated the provisions of § 556.046 RSMo and Appellant's constitutionally protected rights to due process and to a fair trial, as guaranteed by article 1, §§ 10 and 18(a) of the Missouri Constitution, as well as the Sixth and 14th Amendments to the United States constitution, in that: a) the offense of assault in the third degree is a lesser included offense of the offense charged in count III of the indictment, assault in the first degree, and b) there was a basis for a verdict acquitting Appellant of the charged offense of assault in the first degree and the lesser included offense of assault in the second degree and finding Appellant guilty of the offense of assault in the third degree.

State v. Jackson, 433 S.W.3d 390 (Mo. Banc. 2014)

State v. Pierce, 433 S.W.3d 424 (Mo. Banc. 2014)

State v. Williams, 313 S.W.3d 656 (Mo. Banc. 2010)

State v. Santillan, 948 S.W.2d 574 (Mo. Banc. 1997)

§ 556.046.1, § 556.046.2, and § 556.046.3 RSMo

Missouri Constitution, Article I, §§ 10 and 18(a)

U.S. Constitution, Amendments VI and XIV

II[5].

The trial court committed plain error in holding a jury instruction conference in the absence of Appellant without any waiver as to his appearance at the instruction conference because this violated Appellant's constitutionally protected rights to due process, to a fair trial, and to appear and defend, as guaranteed by article 1, §§ 10 and 18(a) of the Missouri Constitution, as well as the Sixth and 14th Amendments to the United States constitution, in that the trial court was aware that Appellant wanted to argue his own case to the jury and yet held a jury instruction conference without Appellant and without any waiver as to his appearance at the instruction conference. Appellant was substantially prejudiced in that the trial court's actions in this regard: 1) deprived Appellant of any meaningful opportunity to provide input on the jury instructions, 2) failed to give Appellant adequate notice as to which instructions were being given and which instructions were not being given, and 3) otherwise deprived Appellant of the opportunity to present his defenses (as opposed to the defenses his attorney would have presented).

State v. Black, 50 S.W.3d 778, 789 (Mo. banc 2001)

Missouri Constitution, Article I, §§ 10 and 18(a)

U.S. Constitution, Amendments VI and XIV

[5] This point relied was Point III of the points relied on in the brief Appellant filed with the Missouri Court of Appeals, Eastern District. However, it has been renumbered as point II of this substitute brief which only raises two of the issues raised b.

ARGUMENTS

I.

The trial court erred in failing to give Appellant's refused jury instruction "A," a jury instruction patterned on MAI CR 3d 319.16 on the offense of assault in the third degree, because the failure to give that instruction violated the provisions of § 556.046 RSMo and Appellant's constitutionally protected rights to due process and to a fair trial, as guaranteed by article 1, §§ 10 and 18(a) of the Missouri Constitution, as well as the Sixth and 14th Amendments to the United States constitution, in that: a) the offense of assault in the third degree is a lesser included offense of the offense charged in count III of the indictment, assault in the first degree, and b) there was a basis for a verdict acquitting Appellant of the charged offense of assault in the first degree and the lesser included offense of assault in the second degree and finding Appellant guilty of the offense of assault in the third degree.

Preservation of Error

During the jury instruction conference, Appellant's attorney requested the trial court to instruct the jury on the lesser included offense of assault in the third degree. (Tr. 299-300). The trial court refused to do so and marked the instruction as Defendant's refused jury instruction "A." (Tr. 301). Subsequently, Appellant's attorney filed a motion for new trial in which she alleged that the trial court erred in refusing to give refused jury instruction "A." (L.F. 1 75-176). Accordingly, this matter is preserved for appellate review. However, in the event this court disagrees, Appellant requests plain error review

pursuant to Supreme Court Rule 30.20. "Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20.

Standard of Review

"This Court reviews *de novo* a trial court's decision whether to give a requested jury instruction under section 556.046, RSMo Supp.2002, and, if the statutory requirements for giving such an instruction are met, a failure to give a requested instruction is reversible error." see State v. Jackson, 433 S.W.3d 390, 395 (Mo. Banc. 2014) (citing State v. Derenzy, 89 S.W.3d 472, 475 (Mo. Banc. 2002)). Moreover, "prejudice is presumed when a trial court fails to give a requested lesser included offense instruction that is supported by the evidence." see State v. Jackson, 433 S.W.3d at 395, footnote 4 (citing State v. Redmond, 937 S.W.2d 205, 210 (Mo. Banc. 1996)).

Argument

In Count III of the substitute information in lieu of indictment it filed in this case, the state charged Appellant with committing the class B felony of assault in the first degree in violation of § 565.050 RSMo. (L.F. 110-111). In charging this offense, the state alleged that on or about November 2, 2009, Appellant, acting with others, shattered a glass bottle on Cameron Bass's head, and that such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to Cameron Bass, and was done for the purpose of committing such assault. (L.F. 111). The trial court ended up submitting a verdict director on the offense of assault in the first degree. (L.F. 133-134, 151-152). That verdict director was labeled jury instruction no. 9

and was based on § 565.050[6] RSMo and MAI-CR 3d 319.12. (L.F. 133-134, 151-152). It read as follows:

> "As to Count III, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about November 2, 2009, in the County of St. Louis, State of Missouri, the defendant attempted to cause serious physical injury to Cameron Bass by shattering a bottle on his head, and
>
> Second, that defendant did not act in lawful self-defense as submitted in Instruction No. 13.
>
> Then you will find the defendant guilty under Count III of assault in the first degree.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.
>
> As used in this instruction, a person attempts to cause serious physical injury when, with the purpose of causing that result, he does any act that is a substantial step toward causing that result. A 'substantial step' is conduct that is strongly

[6] § 565.050 RSMo states as follows: "A person commits the crime of assault in the first degree if he attempts to kill or knowingly causes or attempts to cause serious physical injury to another person.

corroborative of the firmness of the actor's purpose to cause that result." (L.F. 133-134, 151-152).

The trial court also submitted a verdict director on the offense of assault in the second degree. (L.F. 135-136, 153-154). That verdict director was labeled as jury instruction number 10 and was based on § 565.060.1(2)[7] RSMo and MAI-CR 3d 319.12. (L.F. 135-136, 153-154). It read as follows:

> "As to Count III, if you do not find the defendant guilty of assault in the first degree as submitted in instruction no. 9, you must consider whether he is guilty of assault in the second degree as submitted in this instruction.
>
> As to Count III, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that on or about November 2, 2009, in the County of St. Louis, State of Missouri, the defendant knowingly caused physical injury to Cameron Bass by means of a dangerous instrument by shattering a glass bottle over his head, and
>
> Second, that defendant did not act in lawful self-defense as submitted in Instruction No. 13,
>
> then you will find defendant guilty under count III of assault in the second degree.

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[7] § 565.060.1(2) states as follows: "A person commits the crime of assault in the second degree if he…[a]ttempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument."

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

As used in this instruction, the term, 'dangerous instrument' means any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." (L.F. 135-136, 153-154).

However, the trial court refused to submit a verdict director on the offense of assault in the third degree despite the fact that Appellant specifically requested it. (Supp. L.F. 1). That refused verdict director was labeled as instruction "A" and was based on § 565.070.1(1)[8] RSMo and MAI-CR 3d 319.16. (Supp. L.F. 1). It read as follows:

"As to Count III, if you do not find the defendant guilty of assault in the second degree as submitted in instruction no. 9, you must consider whether he is guilty of assault in the third degree as submitted in this instruction.

As to Count III, if you find and believe from the evidence beyond a reasonable doubt:

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[8] § 565.070.1(1) RSMo states as follows: "A person commits the crime of assault in the third degree if…[t]he person attempts to cause or recklessly causes physical injury to another person." § 565.070.1(1) RSMo.

> First, that on or about November 2, 2009, in the County of St. Louis, State of Missouri, the defendant recklessly caused physical injury to Cameron Bass by by shattering a glass bottle on his head,
>
> then you will find defendant guilty under count III of assault in the third degree.
>
> However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.
>
> As used in this instruction, the term, 'recklessly' means to consciously disregard a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in the situation." (Supp. L.F. 1).

The trial court erred in refusing to submit this instruction on assault in the third degree.

There is no question that assault in the third degree is a lesser included offense of assault in the first degree and assault in the second degree. see State v. Nutt, 432 S.W.3d 221, 223 (Mo. App. W.D. 2014) (citing State v. Hibler, 5 S.W.3d 147, 151 (Mo. Banc 1999)). It is specifically denominated as such by statute. § 565.050 RSMo; § 565.070. Therefore, pursuant to § 556.046.1(2)[9] RSMo, the offense of assault in the third degree is

[9] § 556.046.1(2) states as follows: "A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when…[i]t is specifically denominated by statute as a lesser degree of the offense charged…" § 556.046.1(2) RSMo.

a lesser included offense of assault in the first degree and assault in the second degree. § 556.046.1(2) RSMo; see also State v. Hibler, 5 S.W.3d at 151 (specifically holding that "[b]ecause third degree assault is specifically denominated by statute as a lesser degree of the offense charged, it is also an included offense" and citing § 556.046.1(2)).

In addition, read together, the provisions of § 556.046.2 RSMo[10] and § 556.046.3 RSMo, state that a trial court shall not be obligated to instruct the jury on any particular lesser included offense at issue unless: 1) there is a basis for a verdict acquitting the defendant of the offense charged, 2) there is a basis for a verdict acquitting the defendant of any offenses that are lesser included offenses of the offense charged, but are higher in degree than the particular lesser included offense at issue, and 3) there is a basis for convicting the defendant of the particular lesser included offense at issue. § 556.046.2 RSMo and § 556.046.3 RSMo. This is all that is required before a trial court is required to instruct the jury on any particular lesser included offense. The plain language of § 556.046.2 RSMo and § 556.046.3 RSMo does not require affirmative evidence as a condition precedent to obligating the trial court to instruct the jury on a lesser included offense. Moreover, ever since issuing its ruling in State v. Santillan, this Court has consistently held that § 556.046 RSMo does not require affirmative evidence as a condition precedent to obligating the trial court to instruct the jury on a lesser included

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[10] A copy of the provisions of § 556.046 is included in Appellant's Appendix. (Appellant's Appendix A7).

offense. State v. Santillan, 948 S.W.2d 574, 576 (Mo. Banc. 1997); State v. Hineman, 14 S.W.3d 924, 927 (Mo. Banc. 1999); State v. Pond, 131 S.W.3d 792, 794-795 (Mo. Banc. 2004); State v. Williams, 313 S.W.3d 656, 659-661 (Mo. Banc. 2010); State v. Jackson, 433 S.W.3d 390, 395-399 (Mo. Banc. 2014); State v. Pierce, 433 S.W.3d 424, 430-433.

In State v. Santillan, this Court addressed the issue of whether Santillan, who had been charged with murder in the first degree, was entitled to an instruction on murder in the second degree. State v. Santillan, 948 S.W.2d at 574-577. This Court held that Santillan was entitled to an instruction on murder in the second degree even though his defense was limited to evidence of his innocence and even though he had presented no affirmative evidence to support the position that he did not deliberate and was therefore guilty of murder in the second degree as opposed to murder in the first degree. State v. Santillan 948 S.W.2d at 576-577. This Court found that murder in the second degree was a lesser included offense of the offense charged, murder in the first degree, and that the only difference between the two offenses was that murder in the first degree required evidence of deliberation whereas murder in the second degree did not. Id. at 575-576. This Court also found that deliberation is a mental state that is difficult to prove, Id. at 576, and that given the evidence the state had presented, reasonable jurors could have found that Santillan killed the alleged victim, but did so without deliberation . Id. at 576-577. Most importantly, this Court found as follows:

> "The state relies on State v. Olson, 636 S.W.2d 318 (Mo. Banc. 1982), and State v. Chambers, 884 S.W.2d 113 (Mo. App. 1994), for the proposition that

> instructing down is limited to 'those instances where there is some affirmative evidence of a lack of an essential element of the higher offense which would not only authorize acquittal of the higher but sustain a conviction of the lesser.' Olson, 636 S.W.2d at 322. The state claims that because [Santillan's] defense was limited to evidence of his innocence, he was not entitled to a second degree instruction. Section 556.046.2, however, requires only that there be a basis for the jury to acquit on the higher offense in order for the court to submit an instruction for the lesser included offense. If a reasonable juror could draw inferences from the evidence that [Santillan] did not deliberate, the trial court should instruct down. The defendant is not required to put on affirmative evidence as to a lack of deliberation to obtain submission of a second degree murder instruction. To the extent that Olson and Chambers may be read to require a defendant to put on affirmative evidence as to the lack of an essential element of the higher offense, they are overruled." State v. Santillan, 948 S.W.2d at 576.

As such, in State v. Santillan, this Court adopted the position that § 556.046 RSMo does not require affirmative evidence as a condition precedent to obligating the trial court to instruct the jury on a lesser included offense and "requires only that there be a basis for the jury to acquit on the higher offense" in order to submit an instruction for the lesser included offense. Id. at 576.

In State v. Hineman, this Court addressed the issue of whether Hineman, who was charged with assault in the first degree for knowingly causing serious physical injury to

the alleged victim was entitled to an instruction on assault in the second degree for recklessly causing serious physical injury to the alleged victim. State v. Hineman, 14 S.W.3d at 926-927. Concededly, in State v. Hineman, there was conflicting evidence, some of which directly supported an instruction on assault in the second degree for recklessly causing serious physical injury to the victim. Id. at 927. This Court acknowledged this conflicting evidence when it said:

> "Various explanations were introduced into evidence as to how the victim was injured. There was testimony that Hineman pulled on the victim's leg; (1) because it was caught in a blanket; (2) because he was angry at his finacee's stepmother; and (3) out to the side, not hard at all. As previously noted, there was testimony that Hineman demonstrated how he had placed two hands on the leg and pulled it out to the side. There was testimony that the injury occurred when Hineman 'scooted' the victim down in his crib after moving the blankets. There was testimony that Hineman did not try to hurt [the alleged victim]. There was expert testimony that injuries such as the injury in this case can be accidental. There was testimony that Hineman was loving and caring towards the child." State v. Hineman, 14 S.W.3d at 927.

However, this Court also said the following:

> "The trial court is not obligated to give a lesser included offense instruction unless the evidence supports acquitting the defendant of the greater offense and

convicting him of the lesser offense. Section 556.046.2; [other citations omitted]. The defendant is not required to put on affirmative evidence as to the lack of an essential element of the higher offense. State v. Santillan, 948 S.W.2d 574, 576 (Mo. banc 1997). If a reasonable juror could draw inferences from the evidence presented that the defendant acted recklessly, the trial court should instruct down. See id. If there is any doubt concerning the evidence, the trial court should resolve any doubts in favor of instructing on a lower degree of the crime, leaving it to the jury to decide which of two or more grades of an offense, if any, the defendant is guilty. Id. at 577." State v. Hineman, 14 S.W.3d at 927.

As such, in State v. Hineman, this Court maintained the position it had adopted in State v. Santillan that § 556.046 RSMo does not require a defendant to put on affirmative evidence as to the lack of an essential element of a higher offense a condition precedent to obligating the trial court to instruct the jury on a lesser included offense. Id. at 927.

In State v. Pond, this Court addressed the issue of whether Pond, who was charged with statutory sodomy in the first degree, a crime which at the time of the case required evidence of penetration of the female sex organ, was entitled to an instruction on child molestation in the first degree, a crime which did not require evidence of penetration of the female sex organ. State v. Pond, 131 S.W.3d at 793-794. Concededly, in State v. Pond, there was conflicting evidence, some of which directly supported an instruction on child molestation in the first degree for touching, without penetration. Id. at 794. This Court acknowledged this evidence when it said:

> "At trial, the victim testified that Pond 'was pressing in [her] private area between [her] legs with his fingers.' He put his fingers 'in [her] body and it hurt.' Clearly, a jury could find penetration, and convict of statutory sodomy.
>
> Pond, however, emphasizes the cross-examination of the victim, as well as testimony of other witnesses. On cross-examination, the victim admitted she first mentioned penetration at trial, and originally told her mother that Pond 'touched' her and did not say he penetrated her. She further agreed that at the preliminary hearing she said Pond 'pushed on her private area.' Earlier, describing the conduct to a police officer, she stated that Pond 'touched her private area, vagina area.' The victim also told her cousin the morning after the event, that Pond 'was touching her at a bad spot.'" State v. Pond, 131 S.W.3d at 794.

However, this Court also said the following:

> "The State contends a lesser-included instruction is not warranted, because Pond presented no affirmative evidence. It argues that a defendant is not entitled to a lesser-offense instruction merely because a jury might disbelieve some of the State's evidence. The State cites State v. McNaughton, 924 S.W.2d 517, 527 (Mo.App. 1996); State v. Garrison, 975 S.W.2d 460, 461-62 (Mo.App. 1998); State v. Mouse, 989 S.W.2d 185, 192 (Mo.App. 1999); and State v. Hampton, 50 S.W.3d 298, 302 (Mo.App. 2001). These cases rely on State v. Olson, 636 S.W.2d 318, 322 (Mo. banc 1982). Then, instructing down was limited to 'those instances where there is some affirmative evidence of a lack of an essential element of the higher offense which would not only authorize acquittal of the higher but sustain a

> conviction of the lesser.' Id. This Court, however, overruled Olson, and its interpretation of section 556.046.2. *See Santillan, 948 S.W.2d at 576.* Section 556.046.2 requires only *a basis* for the jury to acquit on the higher offense. *Id.* (emphasis added). Like Olson, the cases cited by the State are overruled, to the extent they require affirmative evidence from the defendant." State v. Pond, 131 S.W.3d at 794.

As such, in State v. Pond, this Court a) asserted the fact that it had already overruled State v. Olson and its interpretation of § 556.046.2, and b) asserted that § 556.046.2 requires only a basis for the jury to acquit on the higher offense. Id.

In State v. Williams, this Court addressed the issue of whether Williams, who was charged with robbery in the second degree was entitled to an instruction on stealing from a person. State v. Williams, 313 S.W.3d at 659. This Court found that stealing from a person is a lesser included offense of robbery in the second degree, that the differential element was that stealing from a person does not require evidence of force whereas robbery in the second degree does. Id. at 659. This Court then proceeded to hold that Williams was entitled to an instruction on stealing from a person simply by virtue of the fact that the jury was free to disbelieve any part of the alleged victim's testimony. Id. at 659-661. In the course of doing so, this Court said:

> "In this case, the evidence provided a basis for the jury to acquit Williams of robbery in the second degree and convict him of felony stealing. The jurors could have believed Williams was complicit in the taking of money from Wagner, believed Wagner's testimony that no gun or knife was used, and disbelieved

Wagner's testimony about the use of physical force. Therefore, the trial court erred in not submitting the stealing instruction to the jury.

The State argues that there was no reasonable basis in the evidence for acquitting Williams of robbery in the second degree and convicting him of stealing because Williams denied the commission of the charged offense and there was no basis in the State's evidence or the conflicting version of the crime offered by Williams to support instructing down. The State contends there was no such basis because the jury would have been required to "disbelieve some of the evidence of the state, or decline to draw some or all of the permissible inferences." This, the State claims, "does not entitle the defendant to an instruction otherwise unsupported by the evidence."

The State mistakenly relies on State v. Warrington, 994 S.W.2d 711, 717 (Mo. App. 1994); State v. Arbuckle, 816 S.W.2d 932, 935 (Mo. App. 1991); and State v. Pruett, 805 S.W.2d 724, 725-726 (Mo. App. 1991), to support its argument that a defendant is not entitled to a lesser included offense instruction merely because the jury might disbelieve some of the State's evidence. These three cases rely on the previously overruled case of State v. Olson, in which this Court established that "[s]ection 556.046.2 limit[ed] the requirement of instructing down to those instances where there is some affirmative evidence of a lack of an essential element of the higher offense which would not only authorize acquittal of the higher but sustain a conviction of the lesser." 636 S.W.2d 318, 322 (Mo. Banc. 1982). Olson was overruled by Santillan, 948 S.W.2d at 576 ("To the extent that

> Olson... may be read to require a defendant to put on affirmative evidence as to the lack of an essential element of the higher offense, [it is] overruled.").
>
> While the State acknowledges that after Santillan, the *defendant* was not required to put on affirmative evidence, it nonetheless argues that Williams was not entitled to a lesser included offense instruction because there was no affirmative evidence supporting his instruction. Therefore, the State contends, Williams was not entitled to the instruction on the sole basis that the jury might disbelieve some of the State's evidence. This Court rejected that same argument in Pond, a post-Santillan case. Here, as in Pond, the State relies on pre-Santillan cases and argues that 'a defendant is not entitled to a lesser-included offense instruction merely because a jury might disbelieve some of the State's evidence.' 131 S.W.3d at 794. In Pond, this Court rejected the State's argument, stating, 'A defendant is entitled to an instruction on any theory the evidence establishes.' Id.at 794." State v. Williams, 313 S.W.3d at 660-661.

Once again, this Court maintained the position it had adopted in State v. Santillan that that § 556.046 RSMo does not require affirmative evidence as a condition precedent to obligating the trial court to instruct the jury on a lesser included offense. Id. at 660-661.

In State v. Jackson, this Court addressed the issue of whether Jackson, whom the state had charged with robbery in the first degree, was entitled to an instruction on robbery in the second degree. State v. Jackson, 433 S.W.3d at 392-409. This Court noted that the elements of robbery in the second degree consisted of a subset of the elements of robbery in the first degree, (Id.at 396), and ultimately held that Jackson was entitled to an

instruction on robbery in the second degree. State v. Jackson. 433 S.W.3d at 392-401. In holding as such, this Court said the following:

> "The question presented in this case is whether the trial court can refuse to give a lesser included offense instruction requested by the defendant under section 556.046 when the lesser offense consists of a subset of the elements of the charged offense and the differential element (i.e., the element required for the charged offense but not for the lesser offense) is one on which the state bears the burden of proof. The answer, unequivocally is no." Id. at 392.

The Court reasoned as follows:

> The holdings of *Pond* and *Williams* should have made lesser included offense instructions nearly universal, at least 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 deciding what reasonable jurors must and must not do. Pond, 131 S.W.3d at 794; Williams, 313 S.W.3d at 660. The Court now reaffirms those holdings because, as long as the jury has the right to disbelieve all or any part of the evidence, and refuse to draw needed inferences, section 556.046 cannot be read any other way. *See Pond, 131 S.W.3d at 794.* ('defendant is entitled to an instruction on any theory the evidence establishes' and 'if the evidence supports differing conclusions, the judge must instruct on each'); Williams, 313 S.W.3d at 659-60 ("jury may accept part of a witness's testimony, but disbelieve other parts") (*quoting* MAI–CR 3d 304.11.G). "Doubts concerning whether to instruct on a

> lesser included offense should be resolved in favor of including the instruction, leaving it to the jury to decide." [citation omitted]. State v. Jackson, 433 S.W.3d at 399.

Additionally, this Court reasoned as follows:

> *"Santillan*, *Pond*, and *Williams* combine to hold that the jury's right to disbelieve all or any part of the evidence, and its right to refuse to draw any needed inference, is a sufficient basis in the evidence to justify giving any lesser included offense instruction when the offenses are separated only by one differential element for which the state bears the burden of proof. The Court reaffirms those holdings here. *Santillan* holds that the defendant is not required to put on affirmative evidence to support the lesser offense or refute the greater. *Pond* and *Williams* hold that there is no requirement for such affirmative evidence regardless of who adduces it.
>
> Now, the Court holds expressly what *Pond* and *Williams* only may have implied: a defendant not only does not need to introduce affirmative evidence, he 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. To the extent *Olson* or any other case suggests otherwise, it no longer should be followed." State v. Jackson, 433 S.W.3d at 401-402.

As such, in State v. Jackson, this Court made it clear: a) that a trial court cannot refuse to submit a requested lesser included offense when the lesser offense consists of a subset of the elements of the charged offense and the differential element is one on which the state

bears the burden of proof, b) this is true regardless of whether there is any affirmative evidence and regardless of whether the defense has done anything to impeach the state's witnesses, and c) the mere fact that the jury can reject any portion of a witness's testimony and/or refuse to draw inferences is enough to warrant the giving of the lesser. State v. Jackson, 433 S.W.3d at 392, 399, 401-402.

In State v. Pierce, this Court addressed the issue of whether Pierce, whom the state had charged with trafficking drugs in the second degree in violation of § 195.202.1, was entitled to an instruction on possession of a controlled substance. State v. Pierce, 433 S.W.3d at 430-431. This Court noted that the two offenses only differed in that the state needed to prove that Pierce possessed more than two grams of cocaine base in order to convict him of trafficking drugs in the second degree, whereas the state was not required to prove that Pierce possessed any particular amount of cocaine base in order to convict him of possession of a controlled substance. Id. at 431. This Court then went on to find that Pierce was entitled to an instruction on possession of a controlled substance even though he had done nothing to present affirmative evidence showing that he was in possession of less than two grams of cocaine base and even though he had done nothing to impeach the testimony of the state's witnesses that the amount of cocaine base discovered in his possession was more than two grams. State v. Pierce, 433 S.W.3d at 430-433. In doing so, this Court said:

> The question presented in this case is whether the trial court can refuse to give a lesser included offense instruction requested by the defendant under section 556.046 when the lesser offense consists of a subset of the elements of the charged

> offense and the differential element (i.e., the element required for the charged offense but not for the lesser offense) is one on which the state bears the burden of proof. The answer, unequivocally, is no. [State v. Jackson, 433 S.W.3d at 392]. As explained in *Jackson*, a trial court commits error under section 556.046 in such circumstances because: (1) if the evidence is sufficient to convict the defendant of the charged offense, there is always a basis in the evidence to convict the defendant of a "nested" lesser offense; and (2) if the only difference between the charged offense and the "nested" lesser offense is an element on which the state bears the burden of proof, there is always a basis in the evidence to acquit the defendant of the charged offense because the jury is free to disbelieve all or any part of the evidence concerning that differential element. Jackson, 433, S.W.3d at 404-06." State v. Pierce, 433 S.W.3d at 430.

Ultimately, in light of the provisions of § 556.046 and the caselaw as set forth in this brief, Appellant was entitled to his proposed instruction on assault in the third degree, Appellant's refused instruction "A." There was clearly a basis for acquitting Appellant of the offenses of assault in the first degree and assault in the second degree. There was also a basis for finding Appellant guilty of the offense of assault in the third degree as submitted in his refused instruction "A." These propositions flow from the fact that Appellant's refused instruction "A" was a nested lesser included offense of the offenses of assault in the first degree and assault in the second degree, both of which were

submitted to the jury.[11] The state charged Appellant with assault in the first degree for attempting to cause serious physical injury to Cameron Bass by shattering a glass bottle over his head, (L.F. 110-111), and the jury received an instruction on assault in the first degree which required it to find that Appellant attempted to cause serious physical injury to Cameron Bass by shattering a glass bottle over his head. (L.F. 133-134. 151-152). The jury also received an instruction on assault in the second degree which required it find that Appellant knowingly caused physical injury to Cameron Bass by means of a dangerous instrument by shattering a glass bottle over his head. (L.F. 135-136, 153-154). And Appellant's refused instruction "A" would have required the jury to find that Appellant recklessly caused physical injury to Cameron Bass by shattering a bottle over his head. (L.F. 122). Hence, it is clear that Appellant's proposed lesser on assault in the third degree consisted of a subset of the elements of the instructions on assault first and assault second. And as explained in *Jackson*, a trial court commits error under section 556.046 when it fails to give a requested lesser under such circumstances "because: (1) if the evidence is sufficient to convict the defendant of the charged offense, there is always a basis in the evidence to convict the defendant of a 'nested' lesser offense; and (2) if the only difference between the charged offense and the 'nested' lesser offense is an element on which the state bears the burden of proof, there is always a basis in the evidence to acquit the defendant of the charged offense because the jury is free to disbelieve all or

[11] See p. 26-27 of this Substitute Brief to see why assault in the third degree is a nested lesser of assault in the first degree and assault in the second degree.

any part of the evidence concerning that differential element. Jackson, 433, S.W.3d at 404-06." State v. Pierce, 433 S.W.3d at 430.

Additionally, Appellant requests this Court to note the following: a) the provisions of the assault third statute, § 565.070 RSMo, set forth six different ways to commit the offense of assault in the third degree, b) knowingly causing physical injury is not among them (and could not have possibly been chosen by Appellant's trial counsel), c) recklessly causing physical injury is among them (and was chosen by Appellant's trial counsel), and d) the provisions of §562.021.4 RSMo state the following:

> "If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts purposely or knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts purposely." § 562.021 RSMo.

As such, Appellant submits that it is flat out wrong to suggest that there was no basis to convict Appellant of his proposed lesser on assault third which would have required the jury to find that he recklessly caused physical injury to the alleged victim. (L.F. 122). Not only was there a basis due to it being a nested lesser of the offenses of assault first and assault second, there was a basis based on § 562.021 RSMo and that basis was clearly contemplated by the legislature.

Ultimately, Appellant asserts that under the provisions of § 556.046 RSMo as interpreted by this Court since State v. Santillan and in State v. Pond, State v. Williams,

State v. Jackson, and State v. Pierce, the trial court erred in failing to submit Appellant's proposed lesser on assault in the third degree. There was definitely a basis to acquit of the higher offenses of assault in the first degree and assault in the second degree. In fact, the jury acquitted Appellant of assault in the first degree. (L.F. 173). Moreover, a jury can always disbelieve all or any part of the evidence and has an absolute right to refuse to draw inferences necessary to support a conviction. State v. Jackson, 433 S.W.3d at 399. Additionally, in light of the alleged victim's injuries, which were minimal, there were other potential bases for acquitting Appellant of the offense of assault in the second degree as submitted in jury instruction no 10. (see exhibits 14 and 15 – photos of the alleged victim's injuries). The jury could have found that the bottle that Appellant used to strike the alleged victim was not used in a manner that was readily capable of causing death as required to meet the definition of dangerous instrument as set forth in § 556.061(20) RSMo and the instruction that was submitted to the jury on assault in the second degree. (L.F. 153-154).

Appellant acknowledges that the jury actually found Appellant guilty of the offense of assault in the second degree as submitted in jury instruction no. 10 and therefore presumably found that Appellant used the bottle of vodka in a manner that was readily capable of causing death or serious physical injury. However, Appellant asserts that the jurors may have resolved doubt in favor of a finding of guilt because they did not want to completely acquit Appellant knowing that he had caused physical injury to

Cameron Bass and simply did not have the option of finding Appellant guilty of a lesser included offense.

In addition to there being a basis for acquittal of the offense of assault in the second degree as submitted in jury instruction no. 10, there was a basis for finding Appellant guilty of the offense of assault in the third degree as submitted in Appellant's refused jury instruction "A." A jury could have found that although Appellant did not act by means of a dangerous instrument, he still recklessly caused physical injury to Cameron Bass.[12] It is important to note the interplay of the provisions of § 565.070 RSMo, which do not authorize a conviction for assault third based on knowingly causing physical injury, and the provisions of § 562.021(4) RSMo, which authorize a conviction for recklessly causing physical injury based on knowing conduct.

In objecting to Appellant's refused jury instruction "A," the prosecutor said the following:

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[12] A person "acts recklessly" or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. § 562.016.4 RSMo.

> "Just, the evidence is that from the state's witnesses was that Mr. Randle intentionally hit Mr. Bass over the head with a bottle. Mr. Randle testified, and said he intentionally threw the bottle at Mr. Bass. No matter what version you want to go with, there was an intent to hit him with the bottle by hitting or throwing it. There is no evidence that anything reckless happened. It was all intentional." (Tr. 300).

The trial court then seemed to rely on these statements in declining to give the instruction. (Tr. 301). The trial court said:

> "I agree with Mr. Dittmeier's recollection of the evidence, and I agree specifically [with] the recollection of [what] the state's evidence was. Mr. Randle was hitting Cameron over the head with a bottle, in an obvious intentional manner. Then, of course, on the defendant's side, Mr. Randle took the stand and told us that he threw the bottle at Cameron. Didn't hit him over the head with it, but threw it at him. Not just into a group of people, or in the general direction of some particular person, but threw it at Cameron with the obvious intention to hit him. He's explained why he felt he needed to throw the bottle at him. I don't think this instruction can be supported by the evidence. I'll decline to give it. I'll call it refused instruction A."
>
> (Tr. 301).

There are several problems with the statements made by the prosecutor and the court in stating their beliefs as to why the instruction was not warranted. First, recklessness is consistent with intentional conduct. (see State v. Beeler, 12 S.W.3d 294,

297 (Mo. App. E.D. 2000) (asserting that "the argument that only evidence of an accidental act or an accidental result supports" a finding of recklessness "is incorrect"). Second, Appellant's refused jury instruction "A" was not based on the notion that Appellant threw the bottle of vodka at Cameron Bass. It was based on the notion that Appellant hit Cameron Bass over the head with a bottle of vodka. And third, under the law, an instruction on a lesser included offense need not be supported by affirmative evidence. (see State v. Pond, 131 S.W.3d at 794) (specifically overruling State v. Olson, 636 S.W.2d 318, 322 (Mo. Banc 1982)), which had previously held that instructing down required "affirmative evidence of a lack of an essential element of the higher offense," and holding that "a defendant is entitled to an instruction on any theory the evidence establishes").

III.

The trial court committed plain error in holding a jury instruction conference in the absence of Appellant without any waiver as to his appearance at the instruction conference because this violated Appellant's constitutionally protected rights to due process, to a fair trial, and to appear and defend, as guaranteed by article 1, §§ 10 and 18(a) of the Missouri Constitution, as well as the Sixth and 14th Amendments to the United States constitution, in that the trial court was aware that Appellant wanted to argue his own case to the jury and yet held a jury instruction conference without Appellant and without any waiver as to his appearance at the instruction conference. Appellant was substantially prejudiced in that the trial court's actions in this regard: 1) deprived Appellant of any meaningful opportunity

to provide input on the jury instructions, 2) failed to give Appellant adequate notice as to which instructions were being given and which instructions were not being given, and 3) otherwise deprived Appellant of the opportunity to present his defenses (as opposed to the defenses his attorney would have presented).

Preservation of Error

This is not a matter that was preserved for Appellate review. However, Appellant requests plain error review pursuant to Supreme Court Rule 30.20 RSMo. "Whether briefed or not, plain errors affecting substantial rights may be considered in the discretion of the court when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Rule 30.20.

Standard of Review

Under plain error review, an appellant must demonstrate that the trial court committed an error that was "evident, obvious, and clear" and that such error resulted in a "manifest injustice or miscarriage of justice." State v. Thompson, 401 S.W.3d 581, 584 (Mo. App. E.D. 2013).

Argument

In this case, Appellant was not present at the jury instruction conference. (Tr. 295-308). Appellant acknowledges that no objection was lodged at the time of the instruction conference, that Appellant did not specifically request to be present at the instruction conference, and that this matter is being raised for the first time on appeal. However, Appellant asserts that no waiver of Appellant's appearance at the instruction conference was obtained and that this was plain error in light of the fact that the trial court had been

informed that Appellant wished to conduct his own closing argument and did in fact conduct his own closing argument. (see State v. Black, 50 S.W.3d 778, 789 (Mo. banc. 2001) (holding that "the law is well settled that counsel may waive defendant's presence at an instruction conference")). Appellant further asserts that the trial court knew that Appellant was going to do the closing argument on his own as evidenced by what the trial court said when it was time for the defense to make its closing argument. At that point, the trial court said: "Mr. Randle, you may make your closing remarks." (Tr. 323).

The jury instruction conference and closing arguments are critical stages of a trial. Moreover, the absence of Appellant from the jury instruction conference was particularly glaring given that Appellant argued his own case to the jury during closing arguments and that the trial court knew he was going to do this prior to conducting the jury instruction conference. If Appellant had been present for the jury instruction conference, he could have requested the trial court to include the definition of the term "knowingly" in jury instruction no. 10. The trial court would have been obligated to honor such a request. (see notes on use 7b of MAI-CR 3d 319.12). As it was, Appellant did not have the opportunity to request such an instruction. Consequently, he did not have a meaningful opportunity to argue that even if the jury believed that he had hit Cameron Bass over the head with a vodka bottle and that the vodka bottle was used in manner that made it a "dangerous instrument," he did not act knowingly.

Moreover, if Appellant had been present for the jury instruction conference, he could have requested a jury instruction based on MAI-CR 3d 319.16 and § 565.070.1(1) RSMo that read as follows:

As to Count III, if you do not find the defendant guilty of assault in the second degree as submitted in instruction no. 9, you must consider whether he is guilty of assault in the third degree as submitted in this instruction.

As to Count III, if you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 2, 2009, in the County of St. Louis, State of Missouri, the defendant attempted to cause physical injury to Cameron Bass by by shattering a glass bottle on his head, and

Second, that defendant did not act in lawful self-defense as submitted in Instruction No. 13,

then you will find defendant guilty under count III of assault in the third degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

(MAI-CR 3d 319.16 and § 565.070.1(1) RSMo).

This instruction would have been in proper form and the trial court would not have been able to refuse it on the basis of the fact that it asserted that Appellant acted recklessly as was the case with Appellant's refused instruction "A."

Appellant was substantially prejudiced. The trial court's actions deprived Appellant of any meaningful opportunity to provide input on the jury instructions. In addition, as a result of the trial court's actions, Appellant did not have adequate notice as to which instructions were being given and which instructions were not being given.

Moreover, the trial court's actions deprived Appellant of the opportunity to present his defenses (as opposed to the defenses his attorney would have presented). All of this affected Appellant's ability to argue his case and to present defenses. As such, it is clear that the trial court committed plain error affecting substantial rights and that this resulted in manifest injustice.

CONCLUSION

WHEREFORE, for the reasons set forth in point relied on II, Appellant requests this Honorable Court to vacate the sentence and judgment of conviction in 09SL-CR08751-01 and to remand for new trial. In addition, for the reasons set forth in point relied on I, Appellant requests this Honorable Court to vacate Appellant's convictions as to Counts III and IV and to remand for new trial on those two counts. In the alternative, Appellant requests such other relief as this Court deems just and fair.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 363, I hereby certify that on this 9th day of March, 2015, an electronic version of this brief was sent via electronic mail to the Court and to Mr. Shaun Mackelprang, Office of the Attorney General.

/s/Srikant Chigurupati
Srikant Chigurupati

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and does not exceed 15,500 words, 1,100 lines, or fifty pages. The word-processing software identified that this brief contains 12,786 words, 1142 lines, and 50 pages including the cover page, signature block, and certificates of service and of compliance.

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