No. SC94646

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

ANWAR RANDLE,

Appellant.

Appeal from the St. Louis County Circuit Court
Twenty-first Judicial Circuit
The Honorable Robert S. Cohen, Judge

RESPONDENT'S SUBSTITUTE BRIEF

CHRIS KOSTER
Attorney General

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

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STATEMENT OF FACTS

Mr. Randle appeals his convictions of trespass in the first degree, assault in the second degree, and armed criminal action (L.F. 265-266). Mr. Randle asserts that the trial court erred in refusing his proffered instruction for the included offense of assault in the third degree, and that the trial court plainly erred in holding an instruction conference without Mr. Randle present (App.Sub.Br. 19-20).

* * *

On November 2, 2009, Cameron Bass was living with his girlfriend, Kena Coleman, and her three young children (Tr. 101-102). At about 1:00 a.m., Mr. Bass was asleep, but he awoke when he heard a loud noise (Tr. 103). Ms. Coleman, who was closer to the door, left their bedroom to see what it was, and she told Mr. Bass to stay there (Tr. 103).

Ms. Coleman found Mr. Randle looking at her boys' room (Tr. 145). Mr. Randle had been involved in an on-and-off relationship with Ms. Coleman (Tr. 139-142, 155-160).

Ms. Coleman also saw two other men with Mr. Randle (Tr. 146). One of the other men had a handgun, and the other had a shotgun (Tr. 147). Ms. Coleman screamed at them and told them to get out (Tr. 147). The man with the shotgun grabbed Ms. Coleman, and the other two men went toward her bedroom (Tr. 147).

After Ms. Coleman left the bedroom, Mr. Bass heard some voices, and he turned on the light (Tr. 103). Mr. Bas heard someone tell Ms. Coleman "to get back in the room" (Tr. 104). He also heard someone say, "Where is he at" (Tr. 104).

Mr. Bass went into the closet (Tr. 103). Mr. Randle and the other man (later identified as Omoruyi Obasogie) entered the bedroom (Tr. 106-108, 148). Mr. Randle was holding "a big vodka bottle," and Mr. Obasogie was holding a handgun (Tr. 108, 112-113).

The men were trying to get Mr. Bass to go outside with them (Tr. 108). Mr. Bass came out of the closet, but when he saw the handgun, he ran back into the closet (Tr. 108). The man with the gun fired a shot that hit the wall (Tr. 108-109, 148). Mr. Bass ran through the closet into a connected bedroom—the bedroom of Ms. Coleman's six-year-old daughter, Tashana (Tr. 109). (Tashana was at a relative's house that night (Tr. 139).)

Mr. Bass went to the window to escape, but he saw a third man standing outside with a shotgun (Tr. 112). Mr. Bass hesitated, and the other two men came to the door of Tashana's bedroom (Tr. 112, 149). The man with the shotgun joined them inside (Tr. 113, 149). Mr. Randle hit Mr. Bass on the head with the bottle, and the man with the shotgun tried to shoot him, but the shotgun would not fire (Tr. 113, 149-150). Mr. Randle hit Mr. Bass multiple times with the bottle, and the bottle broke on Mr. Bass's head (Tr.

114-115, 150, 176).

Mr. Randle said, "If I have to come back I'm going to kill you" (Tr. 113). The man with the shotgun hit Mr. Bass with the gun (Tr. 113, 115). Mr. Randle and the other two men then left (Tr. 115, 150).

Mr. Bass called 911 (Tr. 115). When the police arrived, Mr. Bass told them what had happened (Tr. 117). Mr. Bass was bleeding from the forehead (Tr. 186). Mr. Bass and Ms. Coleman later identified Mr. Randle and Mr. Obasogie (Tr. 118, 154, 180). Mr. Randle and Mr. Obasogie had been apprehended after a car chase within minutes of the incident (Tr. 202-203). The third man had been let out of the vehicle immediately after the police had tried to pull their vehicle over, and he fled on foot (Tr. 198). The third man was never captured (Tr. 206).

The State charged Mr. Randle with burglary in the first degree, § 569.160, RSMo 2000, assault in the first degree, § 565.050, RSMo 2000, and two counts of armed criminal action, § 571.015, RSMo 2000 (L.F. 21-22). The State subsequently filed an information in lieu of indictment that added the allegation that Mr. Randle was a prior offender (L.F. 110-111).

Trial commenced August 20, 2012 (Tr. 5). At trial, Mr. Randle testified, and he presented the testimony of his brother (Tr. 233, 244).

Mr. Randle testified about his relationship with Ms. Coleman and said that they were together at the time of the incident (*see* Tr. 256-268). He

testified that he entered Ms. Coleman's house using his keys (Tr. 269). He testified that he went into their bedroom and smelled the odor of "PCP when it's smoked" (Tr. 272). He testified that he turned to say something to Ms. Coleman, and that Mr. Bass "jump[ed] out of the closet and lung[ed] at him" (Tr. 272). He testified that he caught Mr. Bass (Tr. 273). He said that Mr. Bass was holding a gun, and that the gun went off (Tr. 273).

Mr. Randle testified that they wrestled and that he "threw a couple of punches at [Mr. Bass]" (Tr. 273). He testified that he pushed Mr. Bass back into the closet, and that he heard Mr. Bass doing something in there (Tr. 273). He testified that Mr. Bass was "acting crazy," and that his "eyes [were] looking crazy" (Tr. 273). He said that he picked up his bottle of vodka and threw it at Mr. Bass (Tr. 273-274). He said that the bottle shattered against a wall (Tr. 274). He testified that he then rushed at Mr. Bass and repeatedly told him to get out of the house (Tr. 274).

Mr. Randle testified that the boys then woke up, and that Ms. Coleman took them out of the room (Tr. 274-275). He testified that he then left the house, but that he told Ms. Coleman before he left, "you better have this man out of my house before I get back" (Tr. 275). Mr. Randle testified that Mr. Obasogie never entered the house, and that Mr. Obasogie was driving the car when they left (Tr. 275). He said they encountered the police after driving about two blocks (Tr. 275). He said that Mr. Obasogie did not want to pull

over immediately because they "had a bag of weed in the car" (Tr. 276). He said that they pulled over after Mr. Obasogie threw out his weed (Tr. 276). He denied that there was a third man in the car who jumped out (Tr. 281).

The court instructed the jury on burglary in the first degree and an associated count of armed criminal action; the included offense of trespass in the first degree; assault in the first degree and an associated count of armed criminal action; and the included offense of assault in the second degree and an associated count of armed criminal action (L.F. 147-156). The Court also instructed the jury on self-defense (L.F. 157). The Court refused Mr. Randle's proffered instruction on the additional included offense of assault in the third degree (L.F. 122).

The jury found Mr. Randle guilty of the included offense of trespass in the first degree, the included offense of assault in the second degree, and armed criminal action (L.F. 162, 164-165; *see* Tr. 358).

On October 5, 2012, the trial court sentenced Mr. Randle to six months for trespassing, seven years for assault, and seven years for armed criminal action (Tr. 384).

On appeal, the Court of Appeals affirmed Mr. Randle's convictions and sentences. *State v. Randle*, No. ED99137 (Mo.App. E.D. Oct. 7, 2014). On February 3, 2015, this Court granted Mr. Randle's application for transfer.

ARGUMENT

I. The trial court did not err in refusing Mr. Randle's proffered instruction for the included offense of assault in the third degree.

In his first point, Mr. Randle asserts that the trial court erred in refusing his proffered Instruction A, which would have submitted the included offense of assault in the third degree (App.Sub.Br. 21). He asserts that there was a basis to acquit him of assault in the second degree and to convict him of assault in the third degree (App.Sub.Br. 21).

A. The 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 . . .,[ ] and, if the statutory requirements for giving such an instruction are met, a failure to give a requested instruction is reversible error." *State v. Jackson*, 433 S.W.3d 390, 395 (Mo. 2014) (footnote omitted).

B. The trial court did not err in refusing Instruction A

Assault in the third degree is a lesser-degree offense of assault in the first degree and assault in the second degree. Thus, under § 556.046.1(2), RSMo Cum. Supp. 2013, assault in the third degree is an included offense of assault in the first degree and assault in the second degree.

When there is a timely request for an instruction on an included offense (as there was in this case), the trial court is obligated to instruct the jury on

that included offense "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 convicting the defendant of" the requested included offense. § 556.046.3, RSMo Cum. Supp. 2013. *See State v. Jackson*, 433 S.W.3d at 396.

In Mr. Randle's case, the immediately higher included offense was assault in the second degree, which (as submitted in this case) required the jury to determine whether Mr. Randle "knowingly caused physical injury to Cameron Bass by means of a dangerous instrument by shattering a glass bottle over his head" (L.F. 153). Thus, the first question that must be resolved is whether there was a basis to acquit Mr. Randle of assault in the second degree. There was.

In *State v. Jackson*, the Court observed:

> A defendant is entitled to an instruction on any theory the evidence establishes. *Hibler*, 5 S.W.3d at 150. This Court leaves to the jury determining the credibility of witnesses, resolving conflicts in testimony, and weighing evidence. *Rousan v. State*, 48 S.W.3d 576, 595 (Mo. banc 2001). ***A jury may accept part of a witness's testimony, but disbelieve other parts.*** *State v. Redmond*, 937 S.W.2d 205, 209 (Mo. banc 1996). If the evidence supports differing conclusions, the judge must instruct on each. *Hibler*, 5 S.W.3d at 150.

433 S.W.3d at 398 (quoting *State v. Pond*, 131 S.W.3d 792, 794 (Mo. 2004); adding emphasis).

The Court then made plain that a "basis" to acquit the defendant of the greater offense exists in every case: "the jury's right to disbelieve all or any 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 that the state has failed to prove the differential element [of the greater offense]." *Id.* at 399. The Court continued: "No matter how strong, airtight, inescapable, or even absolutely certain the evidence and inference in support of the differential element may seem to judges and lawyers, no evidence ***ever*** proves an element of a criminal case until all 12 jurors believe it, and no inference ***ever*** is drawn in a criminal case until all 12 jurors draw it." *Id.* at 399-400.

Accordingly, here, there was a basis to acquit Mr. Randle of assault in the second degree. The jury did not have to believe or infer that Mr. Randle knowingly caused physical injury to Mr. Bass as submitted in the verdict director. The jury did not have to believe, for example, that Mr. Randle smashed a bottle over Mr. Bass's head. And even if the jury believed that Mr. Randle did hit Mr. Bass with the bottle, the jury was not obligated to infer that he knowingly caused physical injury to him.

The question, then, is whether there was a basis to convict Mr. Randle of the requested lesser-included offense. Mr. Randle's proffered Instruction A

would have required the jury to determine whether Mr. Randle "recklessly caused physical injury to Cameron Bass by shattering a bottle on his head" (L.F. 122). The trial court refused this instruction because there was no evidence that Mr. Randle recklessly caused physical injury to Mr. Bass by shattering a bottle on his head (Tr. 301).[1]

Mr. Randle asserts that there was a basis to convict of the included offense because third-degree assault is a "nested" included offense of the greater offense, and § 562.021 provides a basis to convict of a reckless offense when there is evidence of knowing conduct (App.Sub.Br. 40, 41). Whether the offense is a "nested" offense is particularly important because, in *Jackson*, this Court effectively held that an instruction for a "nested" offense must be given if requested. 433 S.W.3d at 395-405.

Contrary to Mr. Randle's argument, assault in the third degree is not a "nested" included offense of assault in the second degree, and § 562.021 does

[1] Mr. Randle faults the prosecutor and the trial court for using the term "intentionally" (App.Sub.Br. 44-45). But while the colloquial use of the term intentionally (instead of purposely) was not correct, the prosecutor also argued that there was no evidence of recklessness, and the trial court agreed, concluding, "I don't think this instruction can be supported by the evidence" (Tr. 300-301).

not necessarily provide a basis to convict of any included offense that merely has a lesser culpable mental state.

In relevant part, § 562.021 provides, "When recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly." § 562.021.4, RSMo 2000. This statute does not state that the mental state of "recklessly" is "nested" within the mental state of "knowingly." Rather, the statute merely sets forth a general principle of liability, namely, that a person is criminally liable for a reckless offense even if the evidence shows that the person acted knowingly or purposely. In other words, proof that the defendant acted knowingly (*i.e.*, proof that the defendant had a higher culpable mental state) will nevertheless support a conviction for a reckless crime. This operates much like the statute of jeofails. *See* § 545.030, RSMo 2000 ("No indictment or information shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected: . . . (17) Because the evidence shows or tends to show him to be guilty of a higher degree of the offense than that of which he is convicted[.]"). As stated in the comment to the 1973 Proposed Code, "This [subsection] is useful in grading offenses (making it possible to convict for lesser included offenses) and also avoids the argument that something was not done recklessly because it was done knowingly or purposely."

This general principle of liability differs significantly from the concept of "nested" offenses discussed in *Jackson*, which is based on the presence of a "differential element," *i.e.*, an element that differentiates the greater offense from the included offense. As the Court observed in *Jackson*, robbery in the second degree and robbery in the first degree have the same elements, except that robbery in the first degree adds the differential element of "using or threatening to use a weapon." 433 S.W.3d at 404. Thus, robbery in the second degree is a "nested" included offense because its elements are "comprised of a subset of the elements of the charged offense." *Id*.

The offense of assault in the third degree is not similarly "nested" within the offense of assault in the second degree. To the contrary, each offense has an element that the other does not, namely, a different culpable mental state. As relevant here, each offense involved "physical injury," but assault in the second degree had a culpable mental state of "knowingly," while assault in the third degree had a culpable mental state of "recklessly." Thus, "knowingly" is not a differential element that, when removed from the greater offense, leaves a smaller subset of elements that comprise the offense of assault in the third degree.

It is certainly true that § 562.021.4 provides a basis to convict on a "reckless" offense when the evidence proves a "knowing" offense. And, to be sure, if the trial court instructs on an included offense and the defendant is

found guilty of the included offense (as expressly permitted by § 556.046.1), then § 562.021.4, can be relied on to uphold the conviction if the evidence tends to show that the defendant actually had the higher culpable mental state. But that does not mean that the trial court will always be "obligated" under § 556.046.2-.3 to instruct on an included offense.

The analysis under subsections 2 and 3 of the statute (which set forth when the trial court is "obligated" to instruct on an included offense) requires first that there be a basis to acquit of the greater offense. Accordingly, in cases where the basis to acquit of the greater offense is the jury's disbelief of the "knowing" evidence, then that evidence should not then be relied upon to provide a basis to convict the defendant of the lesser offense. Rather, once the "knowing" evidence is disbelieved, the analysis should focus on whether there remains a basis to convict of the included offense; and only if such evidence remains is the trial court obligated to instruct on the included offense.

Here, for example, if the theoretical basis to acquit were the jury's disbelief of the evidence showing that Mr. Randle hit the victim on the head with the bottle, then there would be no basis to convict of the lesser offense (which was also predicated upon that conduct). Of course, in identifying a theoretical basis to acquit, it is not necessary to conclude that the jury would have disbelieved that Mr. Randle hit the victim with the bottle. The jury could have simply refused to infer that his mental state was "knowing," *i.e.*,

the jury could have refused to infer that Mr. Randle knew that "his conduct [was] practically certain" to cause physical injury to the victim. See § 562.016.3(2), RSMo 2000.

Consequently, the question in this case is whether the evidence supported an inference that, in smashing a bottle on Mr. Bass's head, Mr. Randle was merely "reckless," *i.e.*, that he "consciously disregard[ed] a substantial and unjustifiable risk that" he would cause physical injury to the victim. *See* § 562.016.4, RSMo 2000. But in light of the type of injury charged in this case— "physical injury," which is defined as "physical pain, illness, or any impairment of physical condition," § 556.061(20), RSMo 2000—the evidence did not support an inference that Mr. Randle merely consciously disregarded a substantial and unjustifiable risk that smashing a bottle on the victim's head would result in physical pain to the victim.

Some acts of violence, when viewed in relation to the charged result, transcend recklessness and do not give rise to an inference of recklessness. *See*, *e.g.*, *State v. Lowe*, 318 S.W.3d 812 (Mo.App. W.D. 2010) ("Because a person is presumed to have intended for death to follow from acts that are likely to produce that result, a defendant's intentional use of a deadly weapon on a vital part of a victim's body to inflict a fatal injury transcends recklessness so that no rational fact finder could conclude that he did not act knowingly."). The court in *Lowe* stated its conclusion in terms of a fact finder

not being able to conclude that the person "did not act knowingly," but, in light of *Jackson*, it may have been more correct to say that the evidence did not support an inference of recklessness. For while a jury can disbelieve any evidence or refuse to draw an inference, that does not mean that the evidence necessary supports an inference that the defendant actually had a less culpable mental state. Some types of conduct relative to a given result do not support an inference that the defendant actually had the lesser culpable mental state.

More specifically, with regard to causing "physical pain," it does not take much to transcend recklessness. Most acts of physical violence upon another person are "practically certain" to result in at least some "physical pain" to the other person; thus, such acts give rise to an inference of knowing conduct with regard to "physical injury" (which includes mere physical pain) but they do not necessarily give rise to an inference of merely reckless conduct. In other words, a violent blow over the head with a vodka bottle gives rise to an inference of knowingly causing "physical injury" because a blow of that nature is practically certain to cause at least some physical pain.

In sum, assault in the third degree is not a "nested" included offense of assault in the second degree, and there was no evidence that Mr. Randle was merely reckless when he smashed a vodka bottle on Mr. Bass's head.

Mr. Randle also suggests that the jury could have acquitted him by

concluding that he did not use a "dangerous instrument," *i.e.*, that he did not use the vodka bottle in a manner that was readily capable of causing death or serious physical injury. But if the jury had found that he did not use the bottle in that fashion, it necessarily would have concluded that he did not smash the bottle over Mr. Bass's head. And if the jury disbelieved that evidence, then there was no basis to convict Mr. Randle as submitted in the proffered Instruction A.

In sum, Mr. Randle has not identified any evidence showing that he merely recklessly caused physical injury to Mr. Bass by shattering a bottle over his head.[2] Thus, the trial court did not err in refusing Instruction A.

[2] Although he cites *State v. Beeler*, 12 S.W.3d 294 (Mo. 2000), Mr. Randle does not argue that the jury could have found that he acted "recklessly" in self-defense. Inasmuch as Mr. Randle claimed that Mr. Bass fired a gun, there was no evidence that Mr. Randle's use of force in response to that alleged use of deadly force was reckless.

II. The trial court did not plainly err in holding the instructions conference without Mr. Randle present.

In his second point, Mr. Randle asserts that the trial court plainly erred in holding the instructions conference "without any waiver as to his appearance at the instruction conference" (App.Sub.Br. 45). He asserts that he was prejudiced because he was deprived of an opportunity to provide input on the instructions, he was not given adequate notice of the instructions, and he was deprived of an opportunity to present a defense (App.Sub.Br. 45-46).

A. Preservation, waiver, and the standard of review

This claim was not preserved for review. In his point relied on, Mr. Randle asserts that his right to be present under the Missouri Constitution and United States Constitution was violated (App.Sub.Br. 45). As Mr. Randle concedes (App.Sub.Br. 46), these alleged constitutional errors were not preserved by any objection at trial.

This claim also was not included in either of Mr. Randle's timely motions for new trial, one of which was drafted by counsel, and one of which was drafted by Mr. Randle (*see* L.F. 175-177, 181-189). The closest Mr. Randle came to asserting this error was in claim B of his *pro se* motion for new trial, in which he alleged that the trial court erred in failing to instruct the jury on a "claim of right" (L.F. 183). A handwritten addition to the end of claim B stated, "Defendant was not allowed to be present at the instruction

hearing which his attorney, the Asst. Prosecuting Attorney, and the Judge held in private—violation of the 5th, 6th and 14th Amendments of the U.S. Constitution" (L.F. 183). No evidence was presented to support this allegation (the record does not show that Mr. Randle "was not allowed to be present," and the allegation in his motion was not self-proving), Mr. Randle did not allege that there was no waiver of his right to be present (as he now claims), and Mr. Randle did not raise this particular allegation at sentencing where an additional record might have been made.

Accordingly, because there was never any timely or specific objection to the lack of a waiver, this claim of alleged constitutional error was waived. " 'If not raised at the first opportunity in the circuit court, a constitutional claim is waived and cannot be raised here.' " *State v. Pierce*, 433 S.W.3d 424, 429 (Mo. 2014) (quoting *State v. Fassero*, 256 S.W.3d 109, 117 (Mo. 2008)) (holding that an alleged violation of article I, section 19 of the Missouri Constitution was waived).

The rationale for enforcing a waiver is particularly justified in Mr. Randle's case. "Enforcing a waiver in these circumstances 'is in accord with the usual rule that the trial court must be given the opportunity to correct error ***while correction is still possible***.' " *Id.* (quoting *Douglass v. Safire*, 712 S.W.2d 373, 374 (Mo. 1986)). Here, if a timely objection had been made by Mr. Randle, the trial court could have easily made a record of any waiver

of Mr. Randle's presence or, if necessary, conducted another instructions conference with Mr. Randle present. It would have been a simple matter to correct this error before closing arguments commenced.

If this Court elects not to enforce Mr. Randle's waiver of this claim, review is for plain error. "This Court will exercise its discretion to conduct plain error review only when the appellant's request for plain error review establishes facially substantial grounds for believing that the trial court's error was 'evident, obvious, and clear' and 'that manifest injustice or miscarriage of justice has resulted.' " *State v. Jones*, 427 S.W.3d 191, 195 (Mo. 2014). " '[U]nder Missouri law, plain error can serve as the basis for granting a new trial on direct appeal only if the error was outcome determinative[.] ' " *State v. Baxter*, 204 S.W.3d 650, 652 (Mo. 2006). "Manifest injustice is determined by the facts and circumstances of the case, and the defendant bears the burden of establishing manifest injustice." *Id*.

B. There was no plain error resulting in manifest injustice

"The Missouri Constitution provides: 'That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel.' " *State v. Middleton*, 998 S.W.2d 520, 525 (Mo. 1999) (quoting MO. CONST. art. I, sec. 18(a)). However, this right can be waived. *Id*. "Waiver occurs when neither defendant nor defense counsel requests the defendant's presence." *Id*.

Here, the record does not show that either Mr. Randle or defense counsel requested that Mr. Randle be present at the instructions conference. The record also does not show that Mr. Randle was prevented from attending. Accordingly, Mr. Randle's absence was not plain error. *See id.* (observing that counsel had waived the defendant's presence at three hearings, and observing that counsel did so at one hearing by stating, "Judge, for the record I would note that I did not writ my client in for this hearing.").

"The United States Constitution secures the right to be present 'in some situations where the defendant is not actually confronting witnesses or evidence against him.' " *Id.* (quoting *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *State v. Smulls*, 935 S.W.2d 9, 17 (Mo. 1996)). "A defendant has a 'due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." ' " *Id.* "The focus is whether, on the whole record, the defendant could have done or gained anything by attending." *Id.*

However, "[t]he law is settled that counsel may waive defendant's presence at an instruction conference." *State v. Black*, 50 S.W.3d 778, 789 (Mo. 2001). Counsel has this ability because the selection of jury instructions involves only questions of law. In *United States v. Sherman*, 821 F.2d 1337, 1339 (9th Cir. 1987), the court observed, "The Fifth Circuit has held that '[a] defendant does not have a federal constitutional or statutory right to attend a

conference between the trial court and counsel concerned with the purely legal matter of determining what jury instructions the trial court will issue.' " Thus, the court concluded that it was not error for the trial court to fail "to require that [the defendant] be present during the in-chambers proceedings regarding the jury instructions[.]" *Id*. The same is true in Mr. Randle's case.

Mr. Randle asserts that his right to be present was violated because he allegedly could have benefited from being present at the instructions conference, particularly in light of the fact that he intended to give his own closing argument. He suggests three ways that his absence from the instructions conference affected his opportunity to defend against the charges (App.Sub.Br. 45-46).

First, he asserts that if he had been present, "he could have requested the trial court to include the definition of the term 'knowingly' in jury instruction no. 10" (App.Sub.Br. 47). He asserts that without the definition of knowingly, "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" (App.Sub.Br. 47).

But there are at least three basic problems with this argument. First, the mere fact that Mr. Randle "could" have requested the definition of "knowingly," does not prove that he *would* have requested the definition if he

had been present at the instructions conference. There is nothing in the record showing that Mr. Randle wanted to have the word "knowingly" defined for the jury, and presumably counsel would have requested the definition if there were some compelling reason to do so. Second, the absence of a definition of knowingly in no way precluded Mr. Randle from arguing that he did not act knowingly. And, third, Mr. Randle's chosen line of defense was not to argue a lack of knowing conduct. Rather, Mr. Randle argued that he was trying to get Mr. Bass out of his house, that he *did not* break a bottle over Mr. Bass's head, and that he was not guilty of any assault (Tr. 335). In fact, Mr. Randle argued that he did not hit Mr. Bass's head with the bottle, and he asserted that science and logic proved that he did not (*see* Tr. 325-329).

Mr. Randle next asserts that if he had been present at the instructions conference, "he could have requested a jury instruction" for the lesser included offense of assault in the third degree that was drafted differently than the instruction requested by counsel—an instruction that posited that he "attempted to cause physical injury to Cameron Bass by shattering a glass bottle on his head" (App.Sub.Br. 47-48). He asserts that this instruction would have been supported by the evidence, and that the trial court would have been obligated to give it (App.Sub.Br. 48).

But this argument suffers from some of the same problems as the preceding argument. There was no evidence that Mr. Randle would have

submitted, or even wanted to submit, such an instruction. If the defense had wanted such an instruction, trial counsel presumably would have requested it. Moreover, the defense was not premised on the notion that Mr. Randle had the purpose (*i.e.*, that he attempted) to cause physical injury to Mr. Bass by shattering a glass bottle on his head. Again, Mr. Randle argued that he did no such thing and that the evidence proved that he did not (*see* Tr. 335).

Mr. Randle next asserts that, because he was not present at the conference, he "did not have adequate notice as to which instructions were being given and which instructions were not being given" (App.Sub.Br. 48). But the record does not support this conclusory allegation, and there is no reason to believe that the additional notice that would have come from being present at the instructions conference would have enabled Mr. Randle to make any additional, more compelling arguments. The record does not show any complaint by Mr. Randle that he lacked notice, and the record is otherwise replete with Mr. Randle's *pro se* filings (*see* L.F. 30-44, 62-96, 98-103, 108-109, 179-259). Mr. Randle had no trouble communicating to the court his desire to give closing argument (*see* Tr. 183, 308); there is, thus, no reason to believe that he was suddenly incapable of asking the court to accommodate his need for a few extra minutes to prepare. There is nothing in the record indicating that Mr. Randle was surprised by the instructions the court gave, and the trial court refused only one instruction proffered by the

defense. In short, if Mr. Randle had thought he needed a few more minutes to prepare his closing argument (which is all he would have gained by being present at the instructions conference), he could have asked for that time.

Finally, Mr. Randle asserts that he was deprived "of the opportunity to present his defenses (as opposed to the defenses his attorney would have presented)" (App.Sub.Br. 49). But this conclusory allegation also is not supported by the record. Mr. Randle fully argued his "defenses," and he never indicated any other defense that he wanted to argue but was unable to argue due to his being absent from the instructions conference.

In sum, the trial court did not plainly err because the record does not show that either defense counsel or Mr. Randle ever requested that Mr. Randle be present at the instructions conference. Accordingly, counsel waived Mr. Randle's right to be present. Additionally, Mr. Randle cannot prove that the outcome of his trial would have been different if he had been present at the conference. This point should be denied.

CONCLUSION

The Court should affirm Mr. Randle's convictions and sentences.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the attached brief complies with Rule 84.06(b) and contains 5,870 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that an electronic copy of this brief was sent through the Missouri eFiling System on this 6th day of April, 2015, to:

SRIKANT CHIGURUPATI
1010 Market Street, Suite 1100
St. Louis, MO 63101
Tel.: (314) 340-7662
Fax: (314) 340-7685
Srikant.Chigurupati@mspd.mo.gov

CHRIS KOSTER
Attorney General

/s/ Shaun J Mackelprang

SHAUN J MACKELPRANG
Assistant Attorney General
Missouri Bar No. 49627

P.O. Box 899
Jefferson City, MO 65102
Tel.: (573) 751-3321
Fax: (573) 751-5391
shaun.mackelprang@ago.mo.gov

Attorneys for Respondent