

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC94711
)	
)	
BRANDON ROBERTS,)	
)	
Appellant.)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
FIFTH JUDICIAL CIRCUIT, DIVISION THREE
THE HONORABLE PATRICK K. ROBB, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Brandon Roberts, was convicted following a jury trial in the Circuit Court of Buchanan County of domestic assault in the second degree, Section 565.073, and victim tampering, Section 565.270.¹ The Honorable Patrick K. Robb sentenced appellant to five years and two years respectively, to run consecutively. The Missouri Court of Appeals, Western District, reversed appellant's convictions on November 18, 2014. This Court took transfer of this cause on application of the respondent, and therefore has jurisdiction pursuant to Rule 83.04. Article V, Section 9, Mo. Const. (as amended 1976).

¹ Statutory citations are to RSMo 2000.

STATEMENT OF FACTS

Brandon Roberts was charged by information with domestic assault in the second degree for knowingly causing physical injury to his paramour, Amber Angst (L.F. 6). An amended information was filed, which charged Brandon as a prior and persistent offender, and added a count of victim tampering (L.F. 7-8). Trial counsel objected to the joinder and filed a motion to sever those counts (Tr. 23-26, 46, L.F. 9-11). Both the objection to the joinder and the motion to sever were denied (Tr. 26, 46).

At trial, Amber Angst testified that she lived in St. Joseph with her three children (Tr. 178-180). Brandon is her boyfriend; they lived together, along with Brandon's daughter, Heaven (Tr. 180-181). On June 3, Brandon and Amber had been arguing (Tr. 185). They had been in financial struggles, living on food stamps (Tr. 185-186).

That morning, Amber asked Brandon if she could use his truck to go to the grocery store (Tr. 186-187). Brandon was in the shower; he said no (Tr. 187-188). Amber told him she was going anyway, so Brandon ripped down the shower curtain and they started fighting (Tr. 188-189). Amber tried to hit Brandon with the shower curtain rod (Tr. 189). Brandon was hitting and punching her; he hit her with the shower curtain rod (Tr. 189-190).

Amber went and got the truck keys and threw them out the back door (Tr. 191). Brandon went out to find the keys, and the children went with him (Tr. 191-192). He could not find the keys (Tr. 192). Amber was yelling at him, telling him

she was calling the police, so they began fighting again (Tr. 192). Brandon had picked up a hammer in the back yard, although Amber did not know if he hit her with it (Tr. 193-194). He hit her in the back of the head during the fight, and she had knots on her head (Tr. 194, 197). The children ran to a neighbor's house during the fight (Tr. 196). Brandon left with Heaven (Tr. 195-196).

The neighbor, Angie Helm, testified that she was sitting outside that day when Amber's daughter, Kaitlyn, came screaming out of the house, saying "Brandon's beating my mommy with a hammer" (Tr. 237-238). According to Angie, Kaitlyn was hysterical (Tr. 238). Angie went looking for the other children, and saw Brandon coming out the back door with something in his hand (Tr. 239-240). Brandon asked Angie if she could give him a ride out of there, but she said she did not want to get in the middle of it (Tr. 241). Either before or after that conversation, Angie called the police (Tr. 242).

Amber came out; she had red marks on her neck and arm (Tr. 243). She had Angie feel the back of her head to see if it was open, but it was just a knot (Tr. 243). When the police arrived, Angie watched the children while Amber talked to them (Tr. 244). Amber showed them her injuries, including scratches on her forehead and wrists and knots on her head, and described the vehicle Brandon left in (Tr. 248-250).

Brandon was arrested a couple of days later, and Amber spoke to him on the phone a couple of times a day after that (Tr. 200). According to Amber, Brandon wanted her to say that it did not happen, and that she had been injured in

a fight with a girl (Tr. 202). He told her she should plead the Fifth (Tr. 205).

Amber knew the phone calls from the jail were being recorded (Tr. 206). Portions of the jail phone calls were played for the jury (Tr. 303-313, 328, Ex. 35). On the tape, Brandon is heard saying that Amber should “plead the Fifth” and should “say ... that [she is] not testifying in court.” (Ex. 35).

At the instruction conference, defense counsel offered a lesser included offense instruction of domestic assault in the third degree as follows:

INSTRUCTION NO. A

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

First, that on or about June 3, 2012, in the County of Buchanan,

State of Missouri, the defendant recklessly caused physical injury to Amber Angst by punching her, and

Second, that Amber Angst and defendant were adults who had been in a continuing social relationship of a romantic or intimate nature

then you will find the defendant guilty under Count I of domestic 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 domestic assault in the third degree.

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 which a reasonable person would exercise in the situation.

MAI-CR3d 319.76

Submitted by Defendant

(L.F. 34). The court refused that proposed instruction (Tr. 330).

The jury returned verdicts of guilty of domestic assault in the second degree and victim tampering (Tr. 367-368, L.F. 36-37). On March 18, 2013, the Honorable Patrick K. Robb sentenced appellant to consecutive terms of imprisonment of five years and two years, respectively (Tr. 373, 384, L.F. 44-45). Notice of appeal was filed March 21, 2013 (L.F. 47).

On November 18, 2014, the Missouri Court of Appeals, Western District, reversed appellant’s convictions and remanded for a new trial. *State v. Roberts*, 2014 WL 6476715, ___ S.W.3d ___ (Mo. App., W.D. 2014). This Court accepted transfer upon the State’s application.

POINTS RELIED ON

I.

The trial court erred in refusing to instruct the jury on third degree domestic assault, because that offense is a nested lesser included offense of second degree domestic assault, and failing to so instruct the jury violated Section 556.046 and Brandon's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser since the jury could have found that Brandon injured Amber recklessly rather than knowingly in a case of imperfect self-defense.

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

State v. Roberts, 2014 WL 6476715, ___ S.W.3d ___ (Mo. App., W.D. 2014);

State v. Sanders, 2015 WL 456404, ___ S.W.3d ___ (Mo. App., W.D. 2015);

State v. Hineman, 14 S.W.3d 924 (Mo. banc 1999).

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

Sections 556.046, 562.016, and 562.021; and

MAI-CR3d 319.74 and MAI-CR3d 319.76.

II.

The trial court erred in permitting the prosecutor to join the charges of domestic assault in the second degree and victim tampering, and abused its discretion in overruling defense counsel's motion for severance, because these rulings violated Brandon's rights to due process and a fair trial, and the right to be tried only for the crime charged, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that the two alleged instances were not part of the same transaction, a common scheme or plan, or of the same of similar character; and Brandon was substantially prejudiced by the failure to sever the offenses, since the jury was likely to consider the evidence of tampering in considering whether he was guilty of the domestic assault count, and that evidence was more prejudicial than probative.

State v. Saucy, 164 S.W.3d 523 (Mo. App., S.D. 2005);

State v. Conley, 873 S.W.2d 233 (Mo. banc 1994);

State v. Brown, 954 S.W.2d 396 (Mo. App., E.D. 1997);

State v. Bird, 1 S.W.3d 62 (Mo. App., E.D. 1999);

U.S. Const., Amends. VI and XIV;

Mo. Const., Art. I, Secs. 10, 17 and 18(a);

Section 545.140; and

Rules 23.05 and 24.07.

ARGUMENT

I.

The trial court erred in refusing to instruct the jury on third degree domestic assault, because that offense is a nested lesser included offense of second degree domestic assault, and failing to so instruct the jury violated Section 556.046 and Brandon's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offense and a conviction only on the lesser since the jury could have found that Brandon injured Amber recklessly rather than knowingly in a case of imperfect self-defense.

Standard of review

Review of the trial court's refusal to give a lesser included offense instruction under Section 556.046 is *de novo*. *State v. Jackson*, 433 S.W.3d 390, 395 (Mo. banc 2014). "[I]f the statutory requirements for giving such an instruction are met, a failure to give a requested instruction is reversible error."

Id.

Analysis

The trial court erred in refusing to instruct the jury on the lesser included offense of domestic assault in the third degree. There was a basis in the evidence

for the jury to acquit Brandon of domestic assault in the second degree and convict him only of the lesser offense of domestic assault in the third degree since, in the light most favorable to Brandon, the evidence demonstrated that the injuries to Amber were recklessly caused rather than knowingly. Failing to so instruct the jury violated Section 556.046 and deprived Brandon of due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

Amber testified at trial that this was a fight between the two of them; that in the initial stages of the fight, she tried to hit Brandon with the shower curtain rod (Tr. 189). Brandon was hitting and punching her; he hit her with the shower curtain rod (Tr. 189-190).

Amber went and got the truck keys and threw them out the back door (Tr. 191). Brandon went out to find the keys, and the children went with him (Tr. 191-192). He could not find the keys (Tr. 192). Amber was yelling at him, telling him she was calling the police, so they began fighting again (Tr. 192). Brandon had picked up a hammer in the back yard, although Amber did not know if he hit her with it (Tr. 193-194). He hit her in the back of the head during the fight, and she had knots on her head (Tr. 194, 197). This was sufficient evidence to submit the charge of domestic assault as “recklessly caused” rather than as “attempted to cause” serious physical injury.

The jury was instructed on second degree domestic assault as follows:

INSTRUCTION NO. 6

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

First, that on or about June 3, 2012, in the County of Buchanan,
State of Missouri, the defendant knowingly caused physical
injury to Amber Angst by punching her, and

Second, that Amber Angst and defendant were adults who had been
in a continuing social relationship of a romantic or intimate
nature, and

Third, that defendant did not act in lawful self-defense as submitted
in Instruction No. 7.

then you will find the defendant guilty under Count I of domestic assault in
the second 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-CR3d 319.74

Submitted by the State

(L.F. 27).

At the instruction conference, defense counsel offered a lesser included
offense instruction of domestic assault in the third degree as follows:

INSTRUCTION NO. A

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

First, that on or about June 3, 2012, in the County of Buchanan,
State of Missouri, the defendant recklessly caused physical
injury to Amber Angst by punching her, and

Second, that Amber Angst and defendant were adults who had been
in a continuing social relationship of a romantic or intimate
nature

then you will find the defendant guilty under Count I of domestic 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 domestic assault in the third degree.

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 which a reasonable person would
exercise in the situation.

MAI-CR3d 319.76

Submitted by Defendant

(L.F. 34). The court refused that proposed instruction (Tr. 330).

In deciding on how to instruct the jury, the trial court must "resolve all doubts regarding the evidence in favor of instructing on the lower offense." *State v. Mizanskey*, 901 S.W.2d 95, 99 (Mo. App., W.D. 1995). The reviewing court must look at the evidence in the light most favorable to the defendant. *State v. Howard*, 949 S.W.2d 177, 180 (Mo. App., E.D. 1997).

Both the instruction on domestic assault in the second degree that was given and the instruction on domestic assault in the third degree that was offered required the jury to find that Brandon caused physical injury to Amber by punching her and that they were in a continuing social relationship of a romantic or intimate nature (L.F. 27, 34). The only distinction between the two was the difference in the mental element: the second degree instruction required the jury to find knowingly; the third degree instruction recklessly.

In its brief in the Court of Appeals, the State conceded that there was a basis in the evidence to acquit Brandon of the charged offense of domestic assault in the second degree and conclude that he did not knowingly cause physical injury to Amber (Resp. br. 10). The State questioned only "whether the jury could have inferred [Brandon] acted recklessly" in causing Amber physical injury (Resp. br. 12). At the same time, the State conceded that recklessness is established *when* knowingly is established (Resp. br. 15) – in other words, domestic assault in the third degree by recklessly causing physical injury is an offense *nested* within the offense of domestic assault in the second degree by knowingly causing physical injury. "Knowingly" cannot be established without inherently proving

“recklessly.” A person acts recklessly if 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.” Section 562.016.4.

Section 562.021.4 provides in fact that each culpable mental state is included in higher mental states. That section provides that “[w]hen recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly.” In the comment under this section to the 1973 Proposed Code, the drafters wrote that this subsection

makes it clear that the culpable mental states are “graded,” that is, each mental state is included in the higher mental states. This 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.

State v. Roberts, 2014 WL 6476715, ___ S.W.3d ___ (Mo. App., W.D. 2014) at

*5. As the Court of Appeals recognized, under this section, where the evidence is sufficient to prove Brandon was aware that his conduct was practically certain to cause a particular result, there is no need for additional proof that he consciously disregarded a substantial and unjustifiable risk that the result would follow. Third degree domestic assault is therefore a “nested offense” of second degree assault.

See State v. Sanders, 2015 WL 456404, ___ S.W.3d ___ (Mo. App., W.D. 2015)

(holding that involuntary manslaughter is a “nested” lesser included offense to

second degree murder, as the two offenses are only distinguished by “knowingly” versus “recklessly”).

Furthermore, Brandon’s primary defense was self-defense. Although he did not testify at trial, an instruction on self-defense was presented to the jury and his attorney argued self-defense in closing (L.F. 28-29, Tr. 351).

The state cannot have it both ways. If Brandon did not present “enough self-defense” and instead used too much force in defending himself, recklessly striking Amber, then the jury should have been instructed on that defense as an alternative. The proper instruction would have been the lesser included offense of domestic assault in the third degree.

In *State v. Frost*, 49 S.W.3d 212, 220 (Mo. App., W.D. 2001), the Court said:

Based upon the facts of this case, however, there was another alternative that was not foreclosed by the jury’s finding that Ms. Frost purposefully caused Mr. Fingers’ death, but did not do so under the influence of sudden passion arising from adequate cause, and did not act in lawful self-defense in doing so. The conduct of Ms. Frost could still have been consistent with a purposeful homicide, but committed with “an unreasonable belief that the conduct was necessary to save [her] own life.” See [*State v. Beeler*, 12 S.W.3d 294 (Mo. banc 2000)] at 298. “This circumstance is often referred to as ‘imperfect self-defense.’” *Id.*

Similarly, the jury could have found in this case that Brandon was acting in defense of himself when he swung at Amber, and yet believed that the conduct was too reckless to excuse as lawful self-defense.

In *Jackson*, this Court reaffirmed that it is the jury's prerogative to determine which evidence to accept or reject:

[T]he 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.

433 S.W.3d at 401. While the jury could have inferred from the nature of Amber's injuries and the other evidence that Brandon acted knowingly, the jury also could have drawn a different inference from the evidence and concluded that he acted recklessly. If a reasonable juror could draw inferences from the evidence presented that the defendant acted recklessly, the trial court should instruct down. *State v. Hineman*, 14 S.W.3d 924, 927-928 (Mo. banc 1999).

The trial court should have given the jury every alternative that was supported by the evidence. This Court should therefore reverse Brandon's conviction of second degree domestic assault and remand for a new trial. And since the second degree assault was the underlying crime for the victim tampering, Brandon respectfully requests that this conviction be reversed as well. *State v.*

Owens, 270 S.W.3d 533, 540-542 (Mo. App., 2008); *Roberts*, ____ S.W.3d ____,
*7.

II.

The trial court erred in permitting the prosecutor to join the charges of domestic assault in the second degree and victim tampering, and abused its discretion in overruling defense counsel's motion for severance, because these rulings violated Brandon's rights to due process and a fair trial, and the right to be tried only for the crime charged, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that the two alleged instances were not part of the same transaction, a common scheme or plan, or of the same of similar character; and Brandon was substantially prejudiced by the failure to sever the offenses, since the jury was likely to consider the evidence of tampering in considering whether he was guilty of the domestic assault count, and that evidence was more prejudicial than probative.

Standard of review

Whether joinder is proper or improper is a question of law. *State v. Bechhold*, 65 S.W.3d 591, 594 (Mo. App., S.D. 2002). Whether offenses should be severed is within the discretion of the trial court. *State v. Davis*, 738 S.W.2d 517, 518 (Mo. App., S.D. 1987). The trial court should weigh the benefits of judicial economy against the potential prejudice to the defendant. *Id.* Review of the trial court's decision on severance is for abuse of that discretion. *State v. Sims*, 764 S.W.2d 692, 696 (Mo. App., E.D. 1988).

Facts

Brandon Roberts was charged by information with domestic assault in the second degree for knowingly causing physical injury to his paramour, Amber Angst (L.F. 6). An amended information was filed, which charged Brandon as a prior and persistent offender, and added a count of victim tampering (L.F. 7-8). Trial counsel objected to the joinder and filed a motion to sever those counts (Tr. 23-26, 46, L.F. 9-11). Both the objection to the joinder and the motion to sever were denied (Tr. 26, 46).

The two charges proceeded jointly to trial before the Honorable Patrick K. Robb and a Buchanan County jury. Trial counsel included in his motion for new trial error in denying the motion to sever (L.F. 39). The trial court erred in permitting the prosecutor to join the cases and abused its discretion in overruling defense counsel's motion to sever the counts. These rulings violated Brandon's rights to due process and a fair trial. U.S. Const. Amends. VI and XIV; Mo. Const., Art. I, Secs. 10 and 18(a).

Joinder and Severance

There is no constitutional right to be tried for one offense at a time. *State v. Olds*, 831 S.W.2d 713, 718 (Mo. banc 1992). Liberal joinder is favored as a means of achieving judicial economy. *Id.* But the fundamental purpose of a criminal trial is the fair ascertainment of the truth. *State v. Carter*, 641 S.W.2d 54, 58 (Mo. banc 1982). The goal is to obtain a fair determination of the accused's

guilt or innocence of *each* charge. *State v. Conley*, 873 S.W.2d 233, 238 (Mo. banc 1994). “Joinder addresses the more basic question of what crimes can be charged in a single proceeding, while severance presupposes proper joinder and leaves to the trial court’s discretion the determination of whether prejudice may or would result if charges properly joined were tried together.” *State v. Tripp*, 939 S.W.2d 513, 517-18 (Mo. App., S.D. 1997).

In *State v. Saucy*, 164 S.W.3d 523, 528 (Mo. App., S.D. 2005), the Southern District of this Court noted that there are two steps in analyzing a claim for failure to sever charges. The first is determining whether the initial joinder was proper, and, if so, the second question is “whether the trial court abused its discretion in refusing to sever the offenses.” *Id.* (citing, *State v. Kelly*, 956 S.W.2d 922, 925 (Mo. App., W.D. 1997)). Prejudice is presumed from a joint trial where offenses are improperly joined and the trial court erred in overruling the motion to sever. *Id.* (citing *Bechhold*, 65 S.W.3d at 594).

Joinder of offenses is governed by Section 545.140 and Rule 23.05, which states:

All offenses that are of the same or similar character or based on two or more acts that are part of the same transaction or on two or more acts or transactions that are connected or that constitute parts of a common scheme or plan may be charged in the same indictment or information in separate counts.

Brandon’s charges do not meet this test.

In *Saucy*, the defendant was charged with two robberies which occurred six days apart. 164 S.W.3d at 525. The first was at a Dollar General store, where an African-American male put a knife to the neck of an employee and demanded money. *Id.* In the second, at a liquor store, an African-American male made a purchase, then pulled out an object covered with a cloth and demanded money. *Id.* at 526.

The Southern District rejected the State’s argument that joinder was proper because the crimes were of a same or similar character, even though it noted that, “[t]he use of similar tactics in the commission of multiple crimes is sufficient to show that the offenses are of the same or similar character[,]” and that “[t]hose tactics need only resemble or correspond with one another, and they do not need to be identical. *Id.* at 528-29, citing, *Tripp*, 939 S.W.2d at 518.

In *State v. Bird*, 1 S.W.3d 62 (Mo. App., E.D. 1999), the State joined five charges (including receiving stolen property and possession of burglary tools) based on burglaries “where a tire tool and some sort of gloves were used.” *Id.* at 65. The prosecutor argued that joinder was proper because the burglaries were in the same neighborhood, the same time of night, and with the same method of entry. *Id.* The Eastern District found that there were insufficient common characteristics between the offenses. *Id.* at 67. Joinder was improper. *Id.* Similarly, joinder was improper here.

The counts here were not part of the same occurrence, nor were they part of a common scheme or plan. Furthermore, even if the Court believes joinder was

permissible, the counts still should have been severed, because the prejudice in being tried for the victim tampering with the domestic violence charge was very strong. Rule 24.07 governs severance:

When a defendant is charged with more than one offense in the same indictment or information, the offenses shall be tried jointly unless the court orders an offense to be tried separately. An offense shall be ordered to be tried separately only if:

- (a) A party files a written motion requesting a separate trial of the offense;
- (b) A party makes a particularized showing of substantial prejudice if the offense is not tried separately; and
- (c) The court finds the existence of a bias or discrimination against the party that requires a separate trial of the offense.

In *Saucy*, the Court cited *State v. Brown*, 954 S.W.2d 396, 398 (Mo. App., E.D. 1997), for the proposition that, “[T]o join offenses which are not part of a common scheme or plan exposes a defendant to prejudice by allowing proof of the commission of unrelated crimes.” *Saucy*, 164 S.W.3d at 529. Admitting evidence of other crimes not properly related to the cause on trial violates the defendant’s right under the Missouri Constitution, Article I, Sections 17 and 18(a), to be tried for the offense with which he is charged by the information. *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998). Therefore, prejudice is inherent in the fact that the evidence of each of the two incidents would have been inadmissible propensity evidence in a trial of the other, had they been tried separately. This consideration

is a “relevant factor in the determination of prejudice.” *Conley*, 873 S.W.2d at 238.

Only where it is “beyond doubt that the tainted evidence did not affect the jury in its fact-finding process” can the Court find that the evidence of the other crimes did not prejudice the defendant. *Saucy*, 164 S.W.3d at 529. The Court concluded that because joinder was improper, “prejudice [was] presumed and severance [was] mandated.” *Id.* It cannot be said that it is “beyond doubt that the tainted evidence did not affect the jury in its fact-finding process” in Brandon’s case.

Brandon was prejudiced by the trial court’s failure to sever the offenses. This was not an overwhelming case of guilt, as indicated by the jury’s request to see the initial police report and a transcript of Amber’s testimony (L.F. 35). He respectfully requests that this Court reverse his convictions and remand for new, and separate, trials.

CONCLUSION

For the reasons presented, appellant respectfully requests that this Court reverse his convictions and remand for a new trial, or for two separate trials.

Respectfully submitted,

/s/ Ellen H. Flottman

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Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,095 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 19th day of February, 2015, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Ellen H. Flottman

Ellen H. Flottman