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 REPLY BRIEF

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
Woodrail Centre, 1000 West Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977, ext. 323
FAX (573) 777-9974
E-mail: Ellen.Flottman@mspd.mo.gov

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JURISDICTIONAL STATEMENT

Appellant adopts and incorporates by reference the Jurisdictional Statement from his original brief.

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Facts from his original brief.

ARGUMENT[1]

I.

Section 562.021.4 makes domestic assault in the third degree a nested lesser.

The State concedes, as it did in the Western District, that there was a basis for the jury to acquit of the charged offense of domestic assault in the second degree and conclude that Brandon did not knowingly cause physical injury to Amber (Resp. br. 11). The State argues, however, that there was insufficient evidence to support the inference that Brandon recklessly caused physical injury to Amber (Resp. br. 13). Respondent argues that once the basis to acquit is the jury's disbelief of "knowing," then the analysis must focus on the basis to convict of "reckless." (Resp. br. 16). This is contrary to ***State v. Jackson***, 433 S.W.3d 390, 395 (Mo. banc 2014), and Section 562.021.4.

It is circular to argue, as respondent does, that "[i]t is certainly true that Section 562.021.4 provides a basis to convict on a 'reckless' offense when the evidence proves a 'knowing' offense" (Resp. br. 16) but to assert that this does not mean that "reckless" is *included* in "knowing." Respondent points out that this requires a different analysis than one with a differential element – and appellant agrees.

[1] Appellant replies only to Point I and stands on his original substitute brief as to Point II.

But the statute says: "When recklessness suffices to establish a culpable mental state, it is also established if a person acts purposely or knowingly." Section 562.021.4. This cannot be simply an issue of pleading, as in Section 545.030. How can appellant be criminally liable for a reckless act if he is not factually guilty of it?

Imperfect self-defense

Appellant and respondent agree that recklessness must still be supported by the evidence, even under the circumstances wherein the jury could have believed that Brandon used too much force in defending himself, recklessly striking Amber, and resulting in imperfect self-defense under ***State v. Beeler***, 12 S.W.3d 294, 298 (Mo. banc 2000) (an intentional act of self-defense may constitute reckless conduct if the force used was unreasonable). Only if this Court accepts the State's argument that recklessness is not included in knowledge under the statute will it reach this analysis.

But ***Jackson*** still rules. As Respondent notes, "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." ***Jackson***, 433 S.W.3d at 399-400 (Resp. br. 12). ***State v. Pulley***, 356 S.W.3d 187 (2011), cited by respondent, is inapposite after ***Jackson***.

Prejudice

As respondent points out, the prejudice from failing to give a required lesser-included offense instruction arises from the failure to adequately test the firmness of the jury's resolve in their finding of guilt on the greater offense (Resp. br. 21). There is a substantial risk the jury will convict of a higher offense rather than acquit outright, where they are not presented with the option of convicting of a lesser offense. ***McNeal v. State***, 412 S.W.3d 886, 892 (Mo. banc 2013).

Respondent, however, urges this Court to find that the facts of this case rebut a presumption of prejudice; that there was "no reason to believe that the jury harbored doubts" on the question of knowingly causing Amber physical injury (Resp. br. 21). Yet this is exactly what this Court in ***Jackson*** declined to do – to substitute its judgment for that of the jurors. "The jury – and only the jury – will decide what the evidence does and does not prove beyond a reasonable doubt." ***Jackson***, 433 S.W.3d at 402. In fact, in ***Jackson***, this Court remanded for a new trial despite the fact that the jury convicted the defendant of both robbery in the first degree and armed criminal action. ***Id***. at 395, n. 4.

Tampering

Finally, respondent asserts that at most only Brandon's conviction of domestic assault should be reversed, and not that of victim tampering, as the Court of Appeals held. ***State v. Roberts***, 2014 WL 6476715, ___ S.W.3d ___ (Mo. App., W.D. 2014). Respondent notes that the jury made a separate factual finding

that Brandon was guilty of domestic assault in the second degree when it found him guilty of victim tampering (Resp. br. 23). This ignores that the elements of the second degree domestic assault offense were in *that* verdict director – not the victim tampering verdict director. If the victim tampering count is to rely on the factual findings of guilt of domestic assault, then they must rely on factual findings of a domestic assault count that has been adequately tested by a lesser included offense instruction. Both counts must be reversed.

CONCLUSION

For the reasons presented in this substitute reply brief and in appellant's original substitute brief, 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

Ellen H. Flottman, MOBar #34664
Attorney for Appellant
Woodrail Centre, 1000 W. Nifong
Building 7, Suite 100
Columbia, Missouri 65203
Telephone: (573) 777-9977, ext. 323
FAX: (573) 777-9974
E-mail: Ellen.Flottman@mspd.mo.gov

Certificate of Compliance and Service

I, Ellen H. Flottman, hereby certify to the following. The attached reply brief complies with the limitations contained in Rule 84.06(b). The reply brief was completed using Microsoft Word in Times New Roman size 13 point font. Excluding the cover page, the signature block, and this certificate of compliance and service, the reply brief contains 923 words, which does not exceed twenty-five percent of the 31,000 words allowed for an appellant's brief.

On this 8th day of April, 2015, an electronic copy of Appellant's Substitute Reply Brief was placed for delivery through the Missouri e-Filing System to Shaun J. Mackelprang at shaun.mackelprang@ago.mo.gov.

/s/ Ellen H. Flottman

_____

Ellen H. Flottman