No. SC94711

IN THE

Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

BRANDON ROBERTS,

Appellant.

Appeal from the Buchanan County Circuit Court
Fifth Judicial Circuit
The Honorable Patrick K. Robb, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. Roberts appeals his convictions of domestic assault in the second degree, § 565.073, RSMo 2000, and victim tampering, § 575.270, RSMo 2011 (L.F. 44). Mr. Roberts asserts two claims on appeal: first, that the trial court erred in refusing to submit his proffered instruction for the lesser-included offense of domestic assault in the third degree; and second, that the trial court erred in permitting the State to join his charges and abused its discretion in refusing to sever them (App.Sub.Br. 10-11).

* * *

In June, 2012, A.A. was living with Mr. Roberts in Buchanan County (Tr. 180-181). A.A. had three children who lived with them, and Mr. Roberts had one child who also lived with them (Tr. 179-181). A.A. had a close relationship with Mr. Roberts's daughter, and A.A. "raised her like she was one of [her] own kids" (Tr. 184).

On June 3, 2012, A.A. and Mr. Roberts argued (Tr. 185). They had not been getting along in the month prior to that date (Tr. 186). A.A. was not employed, and that was a point of contention between them (Tr. 185).

A.A. had received food stamps on June 3, and she asked Mr. Roberts if she could use his truck to go to the store (Tr. 186). Mr. Roberts was in the shower, and A.A. pulled open the shower curtain to ask the question (Tr. 187-188). Mr. Roberts said, "No," and he flung the shower curtain open (Tr. 188).

A.A. said she was going anyway (Tr. 188).

Mr. Roberts responded by ripping down the shower curtain, and they started fighting (Tr. 189). Mr. Roberts got out of the shower and hit A.A (Tr. 189-190). A.A. picked up the shower curtain rod and tried to hit him with it to defend herself (Tr. 189-190). They were screaming at each other, and Mr. Roberts was punching A.A. (Tr. 190). Mr. Roberts gained control of the shower curtain rod, and he hit A.A. with it (Tr. 190).

The fight ended, and A.A. took Mr. Roberts's truck keys and threw them out the back door (Tr. 191). The children were crying, and Mr. Roberts went outside to find the keys (Tr. 191). The children went outside to help (Tr. 191). A.A. continued to yell and scream at Mr. Roberts, and she said she was calling the police (Tr. 192).

Mr. Roberts went back inside, and they started to fight in the hallway (Tr. 192). They "just started punching each other" (Tr. 192). Mr. Roberts had picked up a hammer in the backyard, but A.A. did not know whether he was still holding it when he went back inside the house (Tr. 193). Mr. Roberts pinned A.A. against the washing machine, and while A.A. was lying across the top of the machine, Mr. Roberts continued to hit her on the back of the head (Tr. 195). After hitting A.A. a couple of times, Mr. Roberts went to put on the rest of his clothes (Tr. 196).

A.A. went out the front door to find the children (Tr. 196). Mr. Roberts

grabbed his daughter and left (Tr. 196). A.A.'s children were at a neighbor's house, and A.A. went there (Tr. 197). One of A.A.'s children, K.A., had run over to the neighbor's house and said, "Brandon's beating my mommy with a hammer" (Tr. 238).

A.A.'s neighbor had called the police, and A.A. talked to the police when they arrived (Tr. 197-198, 247-248). Mr. Roberts had asked the neighbor to "give him a ride out of there," but the neighbor had declined, saying that she "didn't want to get in the middle of it" (Tr. 241). A.A. had "a bunch of red marks on her neck and one of her arms" (Tr. 243). She also had "a knot" on the back of her head (Tr. 243).

A.A. gave a statement to Deputy Grant Nagle (Tr. 248). A.A. pointed out her injuries (Tr. 248). Deputy Nagle observed some red marks and small scratches on A.A.'s head (Tr. 249). He photographed the injuries (State's Exs. 1-10). The red mark in the middle of A.A.'s forehead was "slightly raised up" (Tr. 252). Deputy Nagle also photographed the scene (Tr. 254). A bottle on top of the washing machine had been pushed over the left side, and a gold earring was lying on top of the washing machine on the right side (Tr. 262; State's Exs. 29-31). There was a hammer on the ground in the back yard (Tr. 265; State's Exs. 32-34).

Later that day, A.A. talked to Mr. Roberts on the telephone (Tr. 198). They agreed to meet, and for the next several days, their relationship "was

great" (Tr. 199). They stayed at motels so they "could be together" and avoid the police, who were looking for Mr. Roberts (Tr. 199). They took their children to the zoo and spent time together (Tr. 199).

After about a week, around June 10, they returned to their home (Tr. 200). The police eventually arrested Mr. Roberts (Tr. 200). On August 8, 2012, the State charged Mr. Roberts with domestic assault in the second degree (L.F. 6).

After his arrest, Mr. Roberts spoke to A.A. on the telephone several times (Tr. 200, 285). Mr. Roberts wanted A.A. "to get him out" (Tr. 202). Mr. Roberts wanted A.A. to say "that it didn't happen" (Tr. 202). On one occasion, they discussed having A.A. say that she "got in a fight with a girl" (Tr. 202). Mr. Roberts also wrote A.A. several letters, and in one letter he asked her to say that the assault "didn't happen" (Tr. 203-204).

Toward the end of June or the beginning of July, Mr. Roberts told A.A. "to plead the Fifth" (Tr. 205, 286). At one point, A.A. agreed to do that because (as she later testified) she loved Mr. Roberts (Tr. 206). She also agreed to lie or make up a story because she wanted to "be with him and his daughter" (Tr. 206). The telephone calls were recorded (Tr. 206, 288-289; State's Ex. 35). From June to August, Mr. Roberts made 45 calls to A.A (Tr. 302; State's Ex. 35). Based on Mr. Roberts's communications with A.A., the State charged him with victim tampering (*see* L.F. 7).

Before trial, the State moved to join Mr. Roberts's charges (L.F. 2; Tr. 23). The trial court joined the charges, stating that its ruling did not "foreclose the possibility that [it] would consider severing the cases for trial" (Tr. 26). The court stated that it would "consider that possibility with legal arguments in support of that position" (Tr. 26).

After the court joined the charges, the State filed an amended information charging Mr. Roberts, as a persistent offender, with domestic assault in the second degree, § 565.073 RSMo 2000, and victim tampering, § 575.270, RSMo 2011 (L.F. 7).

Mr. Roberts later moved to sever the charges (L.F. 9-11; Tr. 37). At a hearing on the motion, Mr. Roberts asserted that he would be prejudiced if the jury considered the charges together, and that some evidence of bad acts (*e.g.*, certain telephone conversations) would not be admissible in both trials (Tr. 39-42). The prosecutor responded that she had "narrowed [the telephone calls] down substantially," and that she only intended to present those calls that were "relevant to both charges" (Tr. 43). The trial court denied the motion to sever, concluding that the evidence of each offense was relevant and admissible to prove the other offense (Tr. 45-46). The trial court later listened to the excerpts that the State intended to present and ruled that it would permit the State to present certain, limited portions of the telephone calls (Tr. 215-231, 272-283). (The court also excluded some parts of the calls

(*see, e.g.,* Tr. 223-225, 274, 279, 282-282).)

Trial commenced January 24, 2013 (Tr. 61). The trial court instructed the jury on self-defense (Tr. 329). The trial court refused Mr. Roberts's proffered instruction on the lesser-included offense of domestic assault in the third degree (Tr. 330). The jury found Mr. Roberts guilty of domestic assault in the second degree and victim tampering (L.F. 36-37; Tr. 367-368).

On March 18, 2013, the trial court sentenced Mr. Roberts to five years' imprisonment for domestic assault and two years' imprisonment for victim tampering (L.F. 44; Tr. 384). The court ordered the sentences to be served consecutively (L.F. 44; Tr. 384).

On appeal, the Court of Appeals held that the trial court erred in refusing to instruct the jury on the lesser included offense of domestic assault in the third degree. *State v. Roberts*, No. 76255, slip op. 11-16 (Mo.App. W.D. Nov. 18, 2014). The Court of Appeals also vacated Mr. Roberts's conviction for victim tampering, stating that it had to be vacated because the conviction on the underlying crime of domestic assault in the second degree had been vacated. *Id*. at 17.

On February 3, 2015, this Court granted the State's application for transfer.

ARGUMENT

I. The trial court did not err in refusing to instruct the jury on the included offense of domestic assault in the third degree

In his first point, Mr. Roberts asserts that the trial court erred in refusing his proffered instruction on the included offense of domestic assault in the third degree (App.Sub.Br. 12). He asserts that third-degree domestic assault is a "nested" included offense of second-degree domestic assault, and he asserts 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 [he] injured [A.A.] recklessly rather than knowingly in a case of imperfect self-defense" (App.Sub.Br. 12).

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 to instruct the jury on the included offense of assault in the third degree

Before trial, Mr. Roberts submitted a proposed instruction for the lesser-included offense of domestic assault in the third degree (Tr. 58-59). In

relevant part, the instruction would have required the jury to determine whether Mr. Roberts "recklessly caused physical injury to [A.A.] by punching her" (L.F. 34). The charged offense, by contrast, required the jury to determine whether Mr. Roberts "knowingly caused physical injury to [A.A.] by punching her" (L.F. 27).

Section 556.046.2-.3, RSMo, governs when a trial court is "obligated" to submit lesser offenses to the jury. A trial court is obligated to give an instruction on a lesser offense when three conditions are met: "a. a party timely requests the instruction; b. there is a basis in the evidence for acquitting the defendant of the charged offense; and c. there is a basis in the evidence for convicting the defendant of the lesser included offense for which the instruction is requested." *State v. Jackson*, 433 S.W.3d at 396.

Here, Mr. Roberts's request was made before trial, and he renewed his request at the time of the instructions conference. Thus, he timely requested the instruction.

There was also a basis to acquit of the charged offense and conclude that Mr. Roberts did not knowingly cause physical injury to A.A. In *Jackson*, this Court stated:

> 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.

Id. (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. Roberts of the charged offense. The jury did not have to believe or infer that Mr. Roberts knowingly caused physical injury to A.A. as submitted in the verdict director for domestic assault in the second degree. The jury did not have to believe, for

example, that Mr. Roberts even punched the victim. And even if the jury believed that Mr. Roberts punched the victim, the jury was not obligated to infer that he knowingly caused physical injury to her.

Thus, the ultimate question in this case is whether—after disbelieving the evidence or inferences of a "knowing" mental state—there was evidence supporting the inference that Mr. Roberts merely recklessly caused physical injury to the victim. Mr. Roberts asserts that there was such evidence, and he offers two theories to support his argument: first, that, in light of § 562.021.4, proof of knowing conduct necessarily proves reckless conduct; and second, that the jury could have reasonably inferred that he acted recklessly in self-defense (*i.e.*, that this was a case of imperfect or reckless self-defense).

1. Section 562.021.4

First, relying on § 562.021.4, Mr. Roberts asserts that the culpable mental state of " '[k]nowingly' cannot be established without inherently proving 'recklessly' " (App.Sub.Br. 16-17). He points out that § 562.021.4 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. And, citing the comment to the 1973 Proposed Code as further support that "each mental state is included in the higher mental states," he asserts that "[t]hird degree domestic assault is therefore a 'nested offense' of second degree [domestic] assault" (App.Sub.Br. 17). Whether the offense is a

"nested" offense is particularly important because, in *Jackson*, the Court effectively held that an instruction for a "nested" offense must be given if requested. 433 S.W.3d at 395-405.[1]

But § 562.021.4 does not state that the mental state of "recklessly" is "nested" within the mental state of "knowingly," and it cannot be said that the drafters of the 1973 comment to the proposed criminal code were suggesting that lesser culpable mental states are "nested" within the higher culpable mental states as that term was used in *Jackson*. 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

[1] In making this argument, Mr. Roberts cites to the opinion of the court below before transfer (App.Sub.Br. 17). He also cites to *State v. Sanders*, 2015 WL 456404 (Mo.App. W.D. 2015) (App.Sub.Br. 17). However, the "nested" analysis in *Sanders* was based on the now non-precedential opinion in Mr. Roberts's case. The State has filed an application for transfer in the *Sanders* case. *State v. Sanders*, No. SC94865.

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 domestic assault in the third degree is not similarly "nested" within the offense of domestic 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 domestic assault in the second degree had a culpable mental state of "knowingly," while domestic 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 domestic 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. Roberts punched the victim, then there would be no basis to convict of the lesser offense (which was also predicated upon punching). Of course, in identifying a theoretical basis to acquit, it is not necessary to conclude that the jury would have disbelieved that Mr. Roberts punched the victim. 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. Roberts 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 punching A.A., Mr. Roberts 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. This is a close question, 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. Roberts merely consciously disregarded a substantial and unjustifiable risk that his punches 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 punch (as opposed to, for example, a playful tap) gives rise to an inference of knowingly causing "physical injury" because a punch of sufficient force is practically certain to cause at least some physical pain. By contrast, it would take much greater physical violence to transcend recklessness with regard to causing "*serious* physical injury" or death, and a jury could infer that a punch that resulted in serious physical injury or death was merely reckless.

In sum, domestic assault in the third degree is not a "nested" included offense of domestic assault in the second degree, and there was no evidence that Mr. Roberts was merely reckless when he punched A.A.

2. Imperfect self-defense

Mr. Roberts also asserts that his conduct supported an inference of reckless conduct because the jury could have believed that his "conduct was too reckless to excuse as lawful self-defense"—that he "used too much force in defending himself, recklessly striking [A.A.]" (App.Sub.Br. 18). But an act committed with the intent to cause physical injury is not converted "into a reckless act simply because the underlying act was committed under a claim of self-defense." *See State v. Pulley*, 356 S.W.3d 187, 194 (Mo.App. E.D. 2011). Instead, the relevant question is whether there is evidence that the defendant recklessly caused the intended result. *Id*.

Here, that means there had to be evidence supporting an inference that

Mr. Roberts, in punching A.A. to protect himself from her alleged aggression, was consciously disregarding a substantial risk of unlawfully causing some physical pain to A.A., and that his disregard was a "gross deviation" from the standard that would be employed by reasonable people in that situation.

But punching A.A. in purported self-defense did not support an inference that Mr. Roberts consciously disregarded a substantial and unjustifiable risk that he would unlawfully cause physical pain to A.A. To the contrary, the risk of unlawful force was not substantial and unjustifiable in light of the type of non-deadly force that Mr. Roberts employed to counteract what he perceived as prompting the need to use force, namely, A.A.'s alleged use of non-deadly force. Had Mr. Roberts employed deadly force to defend himself, it might be said that he consciously disregarded a substantial and unjustifiable risk that he would unlawfully cause death or serious physical injury. *See generally State v. Frost*, 49 S.W.3d 212, 217-218 (Mo.App.W.D. 2001) (stabbing and killing a person in response to a persistent request for sex would support a finding of "reckless" self-defense); *State v. Hayes*, 23 S.W.3d 783, 791-792 (Mo.App. W.D. 2000) (shooting and killing a person in response to a slap could support a finding of "reckless" self-defense).

C. Prejudice

If the Court concludes that the trial court erred in refusing to instruct the jury on the included offense of domestic assault in the third degree, the

Court should consider whether the presumption of prejudice that arises when the trial court improperly refuses an instruction on an included offense was rebutted by the facts and circumstances of this case.

Here, the record shows that the jury twice concluded beyond a reasonable doubt that Mr. Roberts knowingly caused physical injury to the victim. First, the jury made that finding when it found him guilty of domestic assault in the second degree (*see* L.F. 27). Second, the jury again made that finding when it found him guilty of the separate offense of victim tampering (*see* L.F. 30).

Because the jury is ordinarily presumed to follow the law in rendering its verdict, the risk of prejudice from the absence of an included-offense instruction arises when there is a possibility that the firmness of the jury's resolve in finding the defendant guilty was not adequately tested. "Even though juries are obligated 'as a theoretical matter' to acquit a defendant if they do not find every element of the offense beyond a reasonable doubt, there is a 'substantial risk that the jury's practice will diverge from theory' when it is not presented with the option of convicting of a lesser offense instead of acquittal." *McNeal v. State*, 412 S.W.3d 886, 892 (Mo. 2013).

Here, in light of the verdicts in this case, there is no reason to believe that the jury harbored doubts on the question of whether Mr. Roberts knowingly caused physical injury to A.A. The jury was instructed to consider

each count separately (*see* L.F. 26), and the jury twice communicated its conclusion that Mr. Roberts knowingly caused physical injury to A.A.

If the jury had not been firmly convinced of that proposition, it stands to reason that the jury would have compromised to lessen his culpability by acquitting him of the second offense. Accordingly, under the facts of this case, the presumption of prejudice that accompanies the risk that the jury might not have followed the instructions was rebutted under the facts of this case.

D. Remedy

Finally, Mr. Roberts asserts that, if the Court finds error, the Court should reverse his convictions and remand for a new trial on both counts, stating that "since the second degree domestic assault was the underlying crime for the victim tampering," his conviction for victim tampering should be reversed as well (App.Sub.Br. 19-20, citing *State v. Owens*, 270 S.W.3d 533, 540-542 (Mo.App. W.D. 2008)). But if the Court concludes that the trial court erred in refusing to instruct the jury on the included offense of third-degree domestic assault, the appropriate remedy is to reverse and remand only for a new trial on the assault charge.

In *State v. Owens*, the defendant was charged with statutory sodomy and victim tampering, and the jury found the defendant not guilty of statutory sodomy. In vacating the victim tampering conviction, the court observed that "in order to convict [Owens] of victim tampering the jury

needed to find that M.D. was in fact victimized." 270 S.W.3d at 539. Thus, the court concluded that "the jury's acquittal of Owens on Count I [statutory sodomy], but its conviction on Count II [victim tampering], were patently inconsistent and require[d] the vacation of Owens' victim tampering conviction." *Id*.

Here, unlike in *Owens*, the jury did not acquit Mr. Roberts of domestic assault in the second degree. To the contrary, it found him guilty.

Additionally, in finding Mr. Roberts guilty of victim tampering, the jury made a separate factual finding that Mr. Roberts was guilty of domestic assault in the second degree. No instructional error has been alleged as to the victim-tampering count, and no challenge to the sufficiency of the evidence has been asserted. Accordingly, there was no error as to the victim-tampering offense, and that conviction should be affirmed. *See State v. Graham*, 2 S.W.3d 859, 866-867 (Mo.App. W.D. 1999) (observing that a "felony murder instruction did not require a finding of guilt of the underlying felony, just a finding of its commission" and upholding the conviction because, "here the jury did find Defendant committed all of the elements of attempt as submitted in Instruction No. 7 and there is no contention the evidence did not support this submission.").

II. The trial court properly joined the charges and did not abuse its discretion in denying Mr. Roberts's motion to sever

In his second point, Mr. Roberts asserts that the trial court erred in joining his charges and in denying his motion to sever (App.Sub.Br. 21). He asserts that the two crimes were not properly joined because they were "not part of the same transaction, a common scheme or plan, or of the same or similar character" (App.Sub.Br. 21). He also asserts that he was prejudiced by the trial court's failure to sever the charges because "the jury was likely to consider the evidence of tampering in considering whether he was guilty of the domestic assault" (App.Sub.Br. 21).

A. Joinder was proper

"Whether joinder is proper is a question of law." *State v. McKinney*, 314 S.W.3d 339, 341 (Mo. 2010). "Liberal joinder of criminal offenses is favored." *Id.*

Joinder of offenses is governed by Rule 23.05; it 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.

See also § 545.140.2, RSMo 2000 ("[T]wo or more offenses may be charged in

the same indictment or information ... if the offenses charged ... are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.").

Mr. Roberts asserts that his charges were not properly joined because they "were not part of the same occurrence, nor were they part of a common scheme or plan" (App.Sub.Br. 24). But in making this argument, Mr. Roberts fails "to give effect to all the provisions for joinder under Rule 23.05 and section 545.140.2." *State v. McKinney*, 314 S.W.3d at 341. Specifically, Mr. Roberts fails to acknowledge that both the rule and the statute permit joinder where offenses are "connected." Offenses can be connected " 'by their dependence and relationship to one another.' " *Id*.

Here, Mr. Roberts's crimes were plainly connected. It was while Mr. Roberts was in jail charged with domestic assault that he tampered with the victim of that domestic assault and attempted to persuade her not to testify against him at the domestic assault trial. Mr. Roberts's tampering would not have occurred but for the domestic assault, and the tampering tended to show his consciousness of guilt of the domestic assault. The crime of victim tampering was, thus, dependent upon and related to the crime of domestic assault. As such, joinder was proper. *See id*. (rejecting the defendant's claim that his attempted escape from jail nine weeks after two murders was

improperly joined with the murders).

B. The trial court did not abuse its discretion in denying Mr. Roberts's motion for severance

"Even where joinder is proper, . . . severance may be necessary to prevent substantial prejudice to the defendant that could result if the charges are not tried separately." *Id*. at 342. "Whether to grant severance is a decision left to the trial court's sound discretion." *Id*.

"The trial court's decision overruling [a] motion to sever will be reversed if the trial court abused its discretion in overruling the motion and if there was a clear showing of prejudice." *Id*. "A trial court abuses its discretion if its ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id*.

"In considering whether severance is required, the court considers 'the number of offenses joined, the complexity of the evidence, and the likelihood that the jury can distinguish the evidence and apply it, without confusion, to each offense.' " *Id*. "Severance is proper only after the defendant 'makes a particularized showing of substantial prejudice if the offense is not tried separately' and after the 'court finds the existence of a bias or discrimination against the party that requires a separate trial of the offense.' " *Id*. "Any prejudice from joinder 'may be overcome where the evidence with regard to

each crime is sufficiently simple and distinct to mitigate the risks of joinder.' " *Id*.

Here, the evidence was quite simple, and there were only two offenses. It would not have been difficult for the jury to consider the evidence of each crime and make an appropriate determination of Mr. Roberts's guilt.

In addition, there was no risk that the jury improperly considered evidence of "other crimes not properly related to the cause on trial," as Mr. Roberts asserts (App.Sub.Br. 25). To the contrary, because Mr. Roberts's crimes were so closely connected, it was entirely proper (and even necessary) for the jury to consider the other crime.

With regard to victim tampering, the jury necessarily had to consider whether Mr. Roberts had committed domestic assault in the second degree because an element of victim tampering was that A.A. "was the victim of the crime of domestic assault in the second degree that was charged as a felony on or about June 3, 2012" (L.F. 30). Thus, if the charge of victim tampering had not been joined with the charge of domestic assault in the second degree, the jury still would have heard all of the evidence pertaining to the charge of domestic assault in the second degree.

Similarly, evidence of the victim tampering would have been relevant and admissible in a separate trial for domestic assault in the second degree because the victim tampering showed Mr. Roberts's consciousness of guilt

and legitimately tended to prove his guilt on the charge of domestic assault in the second degree.

Accordingly, Mr. Roberts cannot claim that he was unfairly prejudiced by a single trial. *See State v. Williams*, 603 S.W.2d 562, 568 (Mo. 1980); *State v. Morant*, 758 S.W.2d 110, 115-116 (Mo.App. E.D. 1988). As the Court stated in *Morant*:

> In this case, even if severance had been granted the same evidence could have been offered in each of two separate trials. Such evidence of other crimes could be admitted to establish motive, intent, the absence of mistake, a common scheme or plan, or the identity of the person charged with the commission of the crime on trial. *State v. Allen*, 674 S.W.2d at 608[5].
>
> . . . As we have shown earlier, the charge of assault arising out of the car chase is admissible evidence of an attempt to escape arrest, which goes to show consciousness of guilt. *See State v. Wallace*, 644 S.W.2d at 384[1]; *State v. Valentine*, 646 S.W.2d 729 (Mo.1983). Any prejudice to the appellant that results from this single trial would also result in separate trials.

758 S.W.2d at 116. The same is true in Mr. Roberts's case.

In short, if Mr. Roberts had been tried in two separate trials, the evidence in each trial would have mirrored the other trial. In such cases,

joinder is plainly appropriate, and it is not an abuse of discretion for the trial court to refuse to sever the charges. This point should be denied.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that the attached brief complies with Rule 84.06(b) and contains 6,320 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:

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